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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

LYNETTE TROUTMAN,
Petitioner,

v.

ESTATE OF ROGER TROUTMAN, et al.,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For Montgomery County, Ohio, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Question 1:

Whether or not the decision of the Court of Appeals that a deceased author's interest in royalties attributable to post-1978 copyrights passed to the administrator as personal property which may be distributed to the deceased author's creditors, leaving the surviving spouse and children destitute, is consistent with applicable federal law.

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the Court whose judgment is subject of this petition are as follows:

Petitioner: Lynette Troutman, the surviving spouse of Larry Troutman, Deceased.

Respondents: W. Michael Conway, Administrator De Bonis Non, of the Estate of Larry Troutman; and Rufus Troutman, Administrator of the Estate of Roger Troutman, Deceased.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that she has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a decision of the Court of Appeals for Montgomery County, Ohio, Second Appellate District.

OPINIONS AND ORDERS BELOW

On August 21, 2008, the Probate Court issued an Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part. This document is reproduced as Appendix "A". The said ruling acknowledged that Petitioner's complaint raised federal questions relating to the ownership of copyrights. App. 3. On September 25, 2009, the Probate Court issued an Entry And Decision Declaring Royalties Belong To The Estate Of Larry Troutman. This document is reproduced as Appendix "B". The Petitioner appealed, but the Probate Court's ruling was affirmed. This decision is shown by Appendices "C" and "D", and was reported as

Troutman v. Estate of Troutman, 189 Ohio App.3d 19, 937 N.E.2d 173 (2010). The Court of Appeals relied on Ohio law to resolve the federal issues, and a timely notice of appeal was filed. On December 29, 2010, the Supreme Court of Ohio declined to hear the case. This Entry is reproduced as Appendix "E", and was reported as *Troutman v. Estate of Troutman*, 127 Ohio St.3d 1486, 939 N.E.2d 184.

JURISDICTION

The decision of the Court of Appeals for Montgomery County, Ohio, Second Appellate District was entered on August 13, 2010. The Ohio Supreme Court refused to hear the case. The Entry from the Ohio Supreme Court was entered on December 29, 2010. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

1. U.S. Const. Art. 1, § 8, cl.8 gives Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. Title 17 § 101 (Definitions), in part, reads as follows:

> A "joint work" is a work prepared by two or more authors with the intention that their contribution be merged into inseparable or interdependent parts of a unitary whole.

3. Title 17 § 201 (Ownership of copyright), in part, reads as follows:

> (a) (Inital Ownership). Copyright in a work protected under this title vests initially in

the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(d) (1) (Transfer of Ownership). The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate of succession.

(e) (Involuntary Transfer). When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual

> author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, or any of the exclusive rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

4. Title 17 § 203 (Termination of transfers and licensed granted by the author) in part, reads as follows:

> (a) Conditions for Termination. In the case of any work other than a work

made for hire, the exclusive or non-exclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more that one-half of the author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination

of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more that one-half of the author's interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant.....

5. Title 17 § 301(Preemption with respect to other laws), in part reads as follows:

(a) On and after January 1, 1978, all legal

> or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

STATEMENT OF THE CASE

Larry Troutman, Deceased, formed the Zap Band at some

time prior to 1978 with his brothers, Roger, Terry, and Lester Troutman. In exchange for royalties generated by the performance of their musical works, Larry and his brothers executed contracts with BMI, Inc. La Strada, Inc., and others, who promoted and distributed their music. These companies paid royalties to the Petitioner, believing that she was entitled to them as a matter of federal law.

The Decedent, married Petitioner in 1981, and remained married to her until his death in April of 1999. The Decedent had several children, including children with the Petitioner. On or about April 25, 1999, the Decedent shot and killed his brother, Roger Troutman. Shortly thereafter, he committed suicide. The Decedent died intestate. The Estate of Roger Troutman brought a wrongful death action against the Estate of Larry Troutman on April 24, 2001. A claim against the Estate of Larry Troutman was subsequently submitted in the amount of **$ 50,000,000.00.** App. 32. Of

course, this claim rendered the estate insolvent.

On March 14, 2008, Petitioner filed a complaint for declaratory judgment in which she sought a determination that as Larry Troutman's surviving spouse, she and the children have the right to all royalties as a matter of federal law.

Later, the Estate of Roger Troutman filed a motion to dismiss pursuant to Civ. R. 12(B)(6), in which it argued that the applicable copyright laws gave the Estate of Larry Troutman, not his surviving spouse or heirs, the present right to receive royalties. The Probate Court converted the motion to dismiss into a motion for summary judgment pursuant to Civ. R. 56 after finding that the Estate of Larry Troutman's memorandum in support contained evidence outside the original pleadings.

On August 21, 2008, the court granted in part and denied in part the converted motion for summary judgment.

In its decision, the court held that pursuant to federal copyright law, only the songs written by Larry Troutman prior to 1978 *could* be deemed to have vested in his surviving spouse and children and pass outside of the estate. The court ruled that the songs written by Larry Troutman after 1978, however, were the property of his estate and did not vest in his surviving spouse or his children. Thus, neither the Petitioner, nor her children were entitled to royalties from the post-1978 songs.

On September 25, 2009, the court issued a final appealable order in which it held that the royalties from the post-1978 songs were the property of the Estate of Larry Troutman. The court also held that the royalty rights in Larry Troutman's pre-1978 songs were the property of the Petitioner and the children. Appeal was taken to the Court of Appeals of Ohio, Second Appellate Division, Montgomery County. In her brief, Petitioner argued that Probate Court's

decision violated applicable federal law, and the Copyrights Clause, and that all royalty proceeds were properly payable to Petitioner. App. 60-63, and 70. On August 13, 2010, the Court of Appeals issued their Opinion affirming the Probate Court's Decision. Timely appeal was taken to Supreme Court of Ohio; however the highest court in the State of Ohio refused to hear the matter, finding no substantial constitutional question. Petitioner is appealing the decision of the Court of Appeals of Ohio, as this was the highest Ohio court to rule on the merits of the case.

REASONS FOR GRANTING THE PETITION

The petition should be granted because, with the year 2013 fast approaching, and an author (many of whom are deceased) being able to terminate grants of a transfer or license pursuant to 17 USC § 203, a ruling from this Court clarifying the issues outlined herein would greatly assist the

music industry, practitioners, and members of the public, in taking the necessary action to properly conduct their affairs.

The ruling of the Court of Appeals flies in the face of nearly 250 years of copyrights legislation and case law. Hearing this case, would greatly help Congress, attorneys, and the public in general, in understanding and properly addressing some of the shortcomings associated with the 1976 Act (effective January 1, 1978), especially as they relate to the protecting the family of a deceased author. And would also help living musicians with estate planning matters. Theses issues are discussed below.

I. THE YEAR 2013 WILL MARK THE FIRST TIME IN WHICH GRANTS PERTAINING TO POST-1978 COPYRIGHTS WILL BE SUBJECT TO TERMINATION AND GUIDANCE FROM THIS COURT IS BADLY NEEDED

As previously stated, the year 2013 will usher in a new

era in copyrights jurisprudence: Beginning on January 1, 2013, or 35 years after the 1976 Act became effective, a grant of a transfer or license of a copyright executed on, or after January 1, 1978, may be terminated pursuant to 17 USC § 203(a)(3). Since 1978 hundreds if not thousands of authors have signed these types of agreements. Many of these authors have passed away, including Larry Troutman, the Decedent at issue in this matter, leaving rather large families without a breadwinner, and perhaps also leaving very, very large debts. A decision from this Court regarding termination of grants relating to these copyrights would also benefit Congress as they seek to redress the 1976 Act.

In the case at bar, it is worth noting that BMI, Inc., and La Strada Inc., two of the companies that are currently promoting the Decedent's music, initially paid royalties directly to the Petitioner. The Probate Court later informed

these two companies that the royalties were properly payable to the Estate, not to Petitioner, and has ordered the Petitioner to return royalties which have been paid to her. This incident tends to show the extent to which the law is unclear, and why granting the petition is of national importance.

II. THE COURT OF APPEALS' REPORTED DECISION IS CONTRARY TO FEDERAL LAW, AND SETS A BAD PRECEDENT ON WHICH THE PUBLIC WILL RELY

In the case at bar, a fifty million dollar claim was submitted against the deceased author's estate. See, Appendix "F". The decision of the Court of Appeals, in ruling that royalties attributable to post-1978 copyrights belong to the deceased author's estate, where they are subject to the claims of creditors, means that the claim submitted against the estate has to be satisfied before any payment could be made to the deceased author's surviving

spouse and children. This reported decision has the effect of making copyright laws subject to the vagaries of the probate laws of all 50 states, which is contrary to the congressional goal of achieving uniformity in copyright laws.

The Court of Appeals looked at 17 USC § 201(a) and (d) and concluded that royalties, being personal property, must pass to the personal representative. App. 25. Of course, Ohio probate law, like the probate laws of many other states, requires the fiduciary to use personalty to pay debts of the estate. The problem here is that the Court of Appeals ignored other applicable federal law, and the facts of the case. The Probate Court ruled that the Decedent's pre-1978 copyrights, and the royalties flowing therefrom, did in fact pass to the surviving spouse and children, but that post-1978 copyrights and royalties did not. Apparently the Ohio courts are of the view that the 1976 Act somehow changed copyright law in regards to the transfer of ownership in a

decedent's interest in copyrights. See, Appendix "B", at App. 13, at ¶ 2. The Petitioner is not convinced that this is the case. One observer has noted that:

> In the years since the 1976 Act took effect, courts and commentators have shown an abiding fondness for the court-embroidered provisions of the superseded 1909 Act. Many courts have concluded, with little analysis, that the new statute codified the case law decided under the old one. Others have ignored the provisions of the 1976 Act, and referred without explanation, only to prior cases. Still others, often without explicit reliance on prior case law, have used common

> law reasoning to reintroduce into the 1976 Act legal doctrine it purports to leave behind. Comment, *Copyright, Compromise, And Legislative History*, 72 Cornell L. Rev. 857 (1987).

This being the case, most of the venerable cases pertaining to pre-1978 copyrights continue to be good law. In *DeSylva v. Ballentine*, 351 U.S. 570 (1956), this Court stated that a deceased author's exclusive interest in copyrights take the form of a "compulsory bequest" to his family. Also see, *Stewart v. Abend*, 495 U.S. 207 (1990) for the same proposition. The Petitioner's Appellate Brief carefully outlined these arguments; see, Appendix "G" at App. 70.

When Congress passed the 1976 General Revision of Copyright Law (the "1976 Act), courts had been deciding copyright cases for more than sixty years under the the 1909 Act. Comment, *Copyright, Compromise, And Legislative*

History, 72 Cornell L. Rev. 857 (1987). The Court of Appeals' assertion that the 1976 Act was intended to revoke existing law is simply not supported by any legislative history. In fact, the contrary seems to be true. In the amendments to the 1976 Act, Congress attempted to restore to authors, their heirs, and assigneds, a second opportunity to recapture copyrights. *Broadcast Music, Inc., v. Roger Miller Music, Inc.*, 396 F.3d 762 (2005), rehearing, enbanc, denied by *Broadcast Music, Inc., v. Roger Miller Music, Inc.*, 2005, U.S. App. Lexis 5623 (6th Cir., Apr. 1, 2005), US Supreme Court certiorari denied by *Turner v. Roger Miller Music*, 126 S. Ct. 374, 163 L. Ed. 2d 162, 2005 U.S. LEXIS 5751 (U.S., Oct. 3, 2005).

Furthermore, Congress' attempt to restore a second opportunity to recapture copyrights is rather clear in the 1976 Act itself: 17 USC § 201(e) prevents involuntary transfers. The Court of Appeals, an Ohio governmental body, is clearly

directing the administrator, an agent of the Probate Court, to take the deceased author's exclusive interest in copyrights, and give them to nonconsensual creditors. This action is contrary to years of clear legislative intent to avoid "unremunerative transfers", and destroys the "economic incentive" which is a touchstone in the creation and dissemination of ideas. *Harper & Row, Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539; 105 S. Ct. 2218 (1985).

Finally, the decisions of the Ohio courts reflects an obvious intent to "visit the sins of the father upon his children". The facts herein are clear that the deceased author did kill his brother, and then took his own life. We have two families that are in bereavement. The Court of Appeals' decision (in affirming the Probate Court's ruling), was clearly intended to ameliorate the suffering of the family of the first to die, albeit at the expense of the other family, which is now destitute. This is impermissible judicial

activism in its purest form, and can not be tolerated. In making this ruling, the Court of Appeals noted "Larry Troutman formed the Zap Band at some time prior to 1978 with his brothers, Roger, Terry, and Lester Troutman". App. 17. The Court Clearly knew that the copyrights at issue were "joint works" as defined in § 101 . As such a grant the the authors of a joint work can only be terminated by "...a majority of the authors who executed it..." 17 USC § 203(a)(1). The grants in question were executed by the Troutman Brothers in or about 1986. The Court of Appeals' statement that upon termination of the transfers in 2013, the right to receive royalties from the songs' copyrights will immediately vest in and become payable to Petitioner and her children, App. 24, are fanciful, and not in accordance with the facts: The chances that a majority of the authors will join in terminating the grant(s) is dubious, and this will not occur in 2013, but much later.

This is certainly not what the Framers, nor Congress, had in mind. The words of one illustrious American author sheds light on goal of copyright laws:

> My copyrights produce to me annually a good deal more money than I have use for. But those children of mine have use for that. I can take care of myself as long as I live. I know a half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years' extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do

> anything. So I hope Congress will extend to them that charity which they have failed to get from me. Arguments Before the Comms. On Patents, S. 6330 and H.R. 19853, 59th Cong., 1 Sess. 117, Statement of Mr. Samuel Clemens (1906).

So then, we see that the legislative history of our copyright laws, shows a definite call on Congress to protect not only the author, but also the surviving spouse and children. The Ohio Courts simply do not get this very important point.

In discussing Ohio probate law, the Court of Appeals stated that the fiduciary is chargeable with a decedent's interest in personal property of any kind. App. 25. I generally agree with the Court of Appeals' pronouncement of Ohio probate law. The problem is that copyrights and the

royalties flowing therefrom, are not personal property of any kind, but are regarded as being so special, that the Framers specifically mentioned them in the Constitution of the United States. Congress, and not the courts, have the right to "...promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..." U.S. Const., Art. 1, Section 8, cl.8. The Ohio Court of Appeals seem all too eager to take away a deceased author's exclusive rights in his creative works, and give them to his creditors. Pursuant to 17 USC § 301(a), Ohio law, as applied by the Court of Appeals, appears to have been preempted, and a fiduciary appointed in Ohio may not deal with copyrights and royalties, as these become a "compulsory bequest" to the deceased author's surviving spouse and children. See, *DeSylva v. Ballentine*, 351 U.S. 570 (1956). As such, neither copyrights, nor the royalties

flowing therefrom, are subject to the claims of a deceased author's noncensensual creditors. It appears that this is what the Framers and Congress had in mind, and what the precedents of this Court teach.

It goes without saying that there is nothing in the legislative history, the Code, nor controlling court precedents, to suggest that the heirs of a deceased author may not receive copyrights and the royalties flowing therefrom, before the right to terminate is exercisable. This would give the beneficiaries of the deceased author an opportunity to assess the performance of the promoters to whom transfers were made, and to make a better determination of which transfers are "unremunerative". App. 73.

CONCLUSION

The decision of the Court of Appeals, which was reported

as *Troutman v. Estate of Troutman*, 189 Ohio App.3d 19, 937 N.E.2d 173 (2010), appeal dismissed by the Ohio Supreme Court, in *Troutman v. Estate of Troutman*, 127 Ohio St.3d 1486, 939 N.E.2d 184, (2010), determined an important question of federal law in a way that conflicts with more than 100 years of clear legislative history, and relevant precedents established by this Court. Consequently, Petitioner requests that the petition be granted.

Alternatively, and in light of the limited time afforded to this Court to fully consider all cases on the merits, the Petitioner requests that the decision issued by the Court of Appeals For Montgomery County, Ohio, Second Appellate District, be summarily reversed.

Respectfully Submitted,

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APPENDIX A

THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

Lynette Troutman,	:	**Case No. 2008MSC00081**
Plaintiff,	:	**(McCollum, J.)**
vs.	:	**ENTRY GRANTING SUMMARY JUDGMENT**
Estate of Roger Troutman, et al.,	:	**IN PART AND DENYING SUMMARY JUDGMENT IN PART**
Defendants.	:	
	:	
Filed Probate Court August 21, 2008 Alice O. McCollum, Probate Judge Montgomery County,	:	
	:	

This case comes before the Court on Defendant, Estate of Roger Troutman's motion to dismiss pursuant to Civ. R. 12 (B)(6), for failure to state a claim for which relief may be granted. The Estate of Larry Troutman filed a response on

June 24, 2008. Lace Dior Love Troutman filed her response in opposition on June 25, 2008. A hearing was held before Judge McCollum on June 30, 2008. As evidence had been attached to the motion, the Court converted it to motion for summary Judgment. Parties were given until July 22, 2008, to file a response. On July 22, 2008,W. Michael Conway, administrator de bonis non of the Estate of Lawrence Troutman filed an affidavit with attached contracts which Lawrence Troutman executed with BMI, Inc., Le Frak Entertainment Co., Ltd., Sanga Music Co. and\ La Strada, Inc.

FACTS

Plaintiff, Lynette Troutman (Lynette), is the surviving spouse of Lawrence Troutman (Larry). Larry also has surviving children. On April 25, 2008 Larry tragically shot and killed his brother Roger Troutman (Roger) and then took his own life. He died intestate. A wrongful death complaint was

filed against Larry's estate by Roger's estate. Larry formed the Zap band with his brothers Terry, Lester, and Roger sometime before 1978. The band members assigned their interests in certain copyrighted musical materials to BMI, Inc. and La Strada, Inc. Larry has one pre-1978 copyrighted work titled "Freedom, Freedom Revised." Larry's many other works were copyrighted in 1978 or after. A dispute arose among the parties as to the ownership of the various royalties earned on behalf of Larry. In her complaint, Plaintiff states that the royalties vested in her as surviving spouse and Larry's children by statute pursuant to 17 U.S.C. §203, 304(a)(2)(B) and 304(c)(1). Plaintiff further asserts that these royalty funds vest in her and children without passing through the estate and royalty money should not be included in any judgment against Larry's estate.

CONCLUSIONS OF LAW

Pursuant to Civ. R. 56(C), a trial court may enter

summary judgment only when (1) no genuine issue as to any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds cannot differ if, when reviewing the evidence in favor the non-moving party, the conclusion is adverse to the non-moving party.

The law differentiates between copyrights created before 1978 (pre-1978) and those created during or after 1978 (post-1978). 17 U.S.C. §203 addresses copyrights assigned on or after January 1, 1978. U.S.C. §304 covers copyrights subsisting on their first term on January 1, 1978.

1. Works Copyrighted Post-1978.

17 U.S.C. §203 addresses copyrights assigned, otherwise than by will, on or after January 1, 1978 and grants the termination interest of a deceased author to his surviving spouse and children. The termination interest only passes to the executor when there are no surviving spouses, children

or grandchildren. Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant. The federal code requires the serving of advanced notice, which states the effective date of termination within the five year time period. Legislative history indicates that [u]nder the bill, termination means that ownership of the rights covered by the terminated grant reverts to everyone who owns termination interest on the date the notice of termination was served... Consequently, ownership interest does not vest until the termination date.

Thus, the individuals who receive the deceased's termination interest will receive ownership interest but not until the date of termination. If the Zap band assigned their interests in 1978, the termination period would not begin until 2013. Thus, the royalties would be properly payable to the estate because the spouse and children could not at this

time exercise their contingent termination interest.

At this time, the surviving spouse and children do not have ownership interest because the date of termination has not arrived as to works created in 1978 or after. There is no issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to only one conclusion. As to these works, Defendant's Motion for Summary Judgment is **GRANTED.**

2. Works Copyrighted Pre-1978

17 U.S.C. §304 covers the duration of copyrights that were subsisting in their first term on January 1, 1978. These first copyrights will last twenty-eight years and then may be renewed for an additional sixty-seven years. Similar to §203, this section provides for the division of the copyrighted renewal rights between the surviving spouse and children. Interest only vests in the estate's executor when there is no surviving spouse or children. While the renewal

rights would vest in the spouse and children, it would not do so until the expiration of the original term. Again, until the renewal rights are vested, the most one can claim is an expectancy or contingency interest. Additionally, it should be noted, these statutory rights cannot be altered by will, testate or intestate law.

For works published before December 31, 1977, the original term has expired and the renewal rights belong to the surviving spouse and children. Larry had one pre-1978 work published in 1975 entitled "Freedom, Freedom Revised". The original copyright term expired in 2003. Renewal rights for this work are vested in Larry's surviving spouse and children. The Defendant is not entitled to judgment as a matter of law. Defendant's motion for summary judgment as to the single pre-1978 work is **DENIED.**

CONCLUSION

Motion for summary judgment is **GRANTED** in part

as to the post-1978 copyrighted works. Motion for summary judgment is **DENIED** as to the single pre-1978 work, "Freedom, Freedom Revised".

IT IS SO ORDERED.

s/ Alice O. McCollum
Alice O. McCollum
Judge, Montgomery County
Probate Court

APPENDIX B

THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

Lynette Troutman,	:	Case No. 2008MSC00081
Plaintiff,	:	(McCollum, J.)
vs.	:	ENTRY AND DECISION DECLARING ROYALTIES
Estate of Roger Troutman, et al.,	:	BELONG TO THE ESTATE OF LARRY TROUTMAN
Defendants.	:	
	:	
Filed Probate Court September 25, 2009 Alice O. McCollum, Probate Judge Montgomery County,	:	
	:	

This matter is before the Court on the parties' request for a final judgment. Plaintiff Lynette Troutman (Lynette) filed complaint for a declaratory judgment asking that the Court declare that all royalties earned on behalf of Larry

Troutman, belong to her, as surviving spouse, and to the children of the deceased without passing through the Estate. W. Michael Conway, Administrator de bonis non of the Estate of Larry Troutman, filed a counterclaim for declaratory judgment requesting the Court declare that the Estate is the rightful owner of the royalties.

FACTS

Lynette is the surviving spouse of Lawrence Troutman (Larry). On April 25, 2008, Larry tragically shot and killed his brother Roger Troutman and then took his own life. A wrongful death complaint was filed against Larry's Estate by the Estate of Roger Troutman. The Estate of Larry Troutman and the Estate of Roger Troutman entered into a settlement agreement whereby the Estate of Larry Troutman is to pay certain funds to the Estate of Roger Troutman.

Larry formed the Zap band with his brothers Terry, Lester,

and Roger sometime before 1978. The band members assigned their interests in certain copyrighted musical material to BMI, Inc. and La Strada, Inc. The Estate has received and continues to receive royalty payments on behalf of Larry. A dispute has arisen among the parties as to the ownership of these royalties. Lynette contends that the royalties vest in her as Larry's surviving spouse and Larry's children by statute under 17 U.S.C. § 203, 304(a)(2)(B) and 304(c)(1). Lynette further asserts that these royalty funds vest in her and the children without passing through the Estate and royalty money should not be included in any judgment against Larry's Estate.

The Estate of Roger Troutman moved for Summary Judgment, which the Court granted in part and denied in part on August 21, 2008. The Court granted summary judgment as to Larry Troutman's works that were copyrighted post-1978. The Court denied summary

judgment as to Larry Troutman's works that were copyrighted post-1978. The Court denied summary judgment as to Larry's one pre-1978 work, "Freedom, Freedom Revised." The Court concluded the Estate of Larry Troutman was entitled to the royalties arising from the post-1978 works.

The parties have filed stipulations. They stipulate that all works except for "Freedom, Freedom Revised" were copyrighted after January 1, 1978. To date, no royalties have been paid to the Estate for "Freedom, Freedom Revised." The parties state that with the stipulations and the facts already of record in this matter, the issues in this case are ripe for the Court's issuance of a final decision.

CONCLUSIONS OF LAW

As the Court granted Summary Judgment as to all post-1978 works, the only matter remaining before the Court is to the single work "Freedom, Freedom Revised."

The Court has previously stated that as to works published before December 31, 1977, the original term has expired and the renewal rights belong to the surviving spouse and children. Thus, Larry's children and Lynette are the owners of all royalties resulting from this one song. However, the Estate has received no payments from this work.

Thus, all royalties earned by Larry Troutman are the result of his post-1978 copyrighted songs. Because all royalties are a result of the post-1978 works, the Estate is the lawful owner of all royalties earned by Larry Troutman.

CONCLUSION

Therefore, the Court **GRANTS** a declaratory judgment in favor of the Estate of Larry Troutman. All royalties earned by Larry Troutman, since his death, are the property of the Estate. The Court **DENIES** a declaratory judgment in favor of Lynette Troutman.

IT IS SO ORDERED.

s/ Alice O. McCollum
Alice O. McCollum
Judge, Probate Judge

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DIVISION
MONTGOMERY COUNTY

Lynette Troutman,	**: C.A. No. 23699**
	T.C. No. 2008MSC00081
Plaintiff-Appellant,	**:**
	(Civil appeal from
v.	**: Common Pleas Court,**
Estate of Roger Troutman,	**Probate Division)**
et al.	**:**
Defendants-Appellees.	**:**
Filed in the	**:**
Court of Appeals	
August 13, 2010	**:**
Gregory A. Brush	**:**
Clerk of Courts,	
Montgomery Co. Ohio	**:**

OPINION

Rendered on the 13th day of August, 2010.

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WORRELL A. REID, Atty. Reg. No. 0059620, 6718 Loop

Rd., #2, Centerville, Ohio 45459

Attorneys for Plaintiff-Appellant

DAVID M. RICKERT, Atty. Reg. No. 0010483, 110 N. Main Street, Suite 1000, Dayton, Ohio 45402

Attorney for Defendants-Appellees Estate of Larry Troutman and W. Michael Conway, Administrator De Bonis Non of the Estate of Larry Troutman

WILLIAM A. SHERMAN, II, Atty. Reg. No. 0037927, 1900 Chemed Center, 255 E. Fifth Street, Cincinnati, Ohio 45202

Attorney for Defendant-Appellee Estate of Roger Troutman

LU ANN STANLEY, Atty. Reg. No. 0029933, 15 W. Fourth Street, Dayton, Ohio 45402

Attorney for Defendant-Appellee Lace Troutman

DONOVAN, P.J.

Plaintiff-appellant Lynette Troutman appeals from a decision of the Montgomery County Court of Common Pleas, Probate Division, filed on September 25, 2009.

Appellant filed a timely notice of appeal on October 16, 2008.

Larry Troutman formed the Zap Band at some time prior to 1978 with his brothers, Roger, Terry, and Lester Troutman. In exchange for royalties generated by the performance of their musical works, Larry and his brothers executed contracts in which they assigned their interest in the copyrighted material to BMI, Inc. and La Strada, Inc. who promoted and distributed their music.

Larry Troutman married appellant in 1981, and remained married to her until his death in April of 1999. Two children were born of the marriage. The record establishes that on April 25, 1999, Larry shot and killed his brother, Roger Troutman. Shortly thereafter, Larry committed suicide. Larry died intestate. The Estate of Roger Troutman brought a wrongful death action against the Estate of Larry Troutman on April 24, 2001. The matter was

subsequently dismissed without prejudice for failure to prosecute on July 15, 2008.

On March 14, 2008, appellant filed a complaint for declaratory judgment in which she sought a determination that as Larry Troutman's surviving spouse, she and the children have the right to royalties generated by songs in which Larry had copyright interest at the time of his death. Appellant also requested that the court find that Larry's estate did not have any claim to the royalties from the songs.

On April 11, 2008, the Estate of Roger Troutman filed a motion to dismiss pursuant to Civ. R. 12(B)(6), in which it argued that the applicable copyright laws gave the Estate of Larry Troutman, not his surviving spouse or heirs, the present right to receive royalties. On June 24, 2008, the Estate of Larry Troutman filed a memorandum in support of the motion to dismiss. Lace Dior Love Troutman, one of Larry Troutman's children with appellant, filed a

memorandum in opposition to the motion to dismiss on June 25, 2008.

On June 30, 2008, the court converted the motion to dismiss into a motion for summary judgment pursuant to Civ. R. 56 after finding that the Estate of Larry Troutman's memorandum in support contained evidence outside the original pleadings.

On August 21, 2008, the court granted in part and denied in part the converted motion for summary judgment. In its decision, the court held that pursuant to federal copyright law, only the songs written by Larry Troutman prior to 1978 *could* be deemed to have vested in his surviving spouse and children and pass outside of the estate. The court ruled that the songs written by Larry Troutman after 1978, however, were the property of his estate and did not vest in his surviving spouse or his children. Thus, neither appellant nor her children were entitled to royalties from the post-1978

songs.

Appellant filed a notice of appeal with this Court in Case No. CA 22953. However, on February 11, 2009, both parties filed a joint motion to remand the case back to the probate court since the decision was not a final appealable order. In an order filed February 27, 2009, we granted the parties' joint motion for remand, and the case was sent back to the probate court for disposition.

On June 3, 2009, the court entered default judgment against several non-answering parties. In order to facilitate the issuance of a final appealable order, the parties filed a stipulation on September 8, 2009, wherein the parties agreed that the Estate of Larry Troutman had a potential interest in only one song copyrighted before January 1, 1978, and that no royalties had been paid for that particular song. The parties further stipulated that the remainder of the musical works at issue were copyrighted post-1978 and that

substantial royalties had been paid based upon those works.

On September 25, 2009, the court issued a final appealable order in which it held that the royalties from the post-1978 songs were the property of the Estate of Larry Troutman. The court also held that the royalty rights in Larry Troutman's pre-1978 songs were the property of appellant and the children.

It is from this judgment which Lynette Troutman now appeals.

II

Appellant's sole assignment of error is as follows: "WHETHER OR NOT THE TRIAL COURT'S ENTRY GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART WAS CONTRARY TO FEDERAL COPYRIGHT LAWS, IN LIGHT OF THE COURT'S HOLDING THAT ROYALTIES RELATING TO POST-1978 COPYRIGHTS WERE

PROPERLY PAYABLE TO THE DECEDENT'S ESTATE (AND ESSENTIALLY, TO CREDITORS OF THE ESTATE) AND NOT TO DECEASED AUTHOR'S SURVING SPOUSE AND CHILDREN."

In her sole assignment, appellant contends that the court erred when it held that, pursuant to federal copyright statutes, the royalties earned from the decedent's post-1978 songs were properly payable to the estate of the decedent. Appellant also argues that a genuine issue existed as to whether Larry Troutman transferred the copyrights to his musical works prior to his death in 1999.

A declaratory judgment action allows a court of record to declare the tights, status and other legal relations to the parties. Civ. R. 57 and R.C. 2721.01. When a declaratory judgment action is disposed of by summary judgment, an appellate court's review of the trial court's resolution of the legal issues is de novo. Hence, summary

judgment is proper if:

"(1) No genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Welco Industries, Inc. v. Applied Cos. (1993)*, 67 Ohio St.3d 344, 346.

Initially, we note that no genuine issue exists with respect to whether Larry Troutman transferred or assigned the copyrights to his post-1978 songs. The record clearly establishes that members of the Zap Band, including Larry Troutman, assigned their interest in their post-1978 musical works "to BMI, Inc. and La Strada, Inc., *** which in turn, agreed by contract to market said musical material and to pay the brothers royalties generated by marketing and licensing

the public performance of said material." Verified Complaint for Declaratory Judgment of Lynette Troutman, ¶8. Thus, it is apparent from the face of appellant's own complaint that the decedent transferred his copyrights to the post-1978 songs for licensing and distribution purposes prior to his death, and no genuine issue exists regarding that fact.

17 U.S.C. § 201(d)(1) states in pertinent part:

"(d) Transfer of Ownership.

"(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will *or pass as personal property by the applicable laws of intestate succession.*"

It is undisputed that Larry Troutman died without leaving a will. Since Larry died intestate, and his right to receive royalties from the post-1978 songs passed not to

appellant and his children, but rather to his estate. Until distribution, the administrator of Larry's estate has a duty to collect the assets and complete administration of the estate, which includes settling the payment of estate obligations. *In re Hirsh's Estate* (1946), 146 Ohio St. 393. The administrator of the estate is also charged with the duty to administer personal property including income generated therefrom. *Winters Nat. Bank & Trust v. Riffe* (1965), 2 Ohio St.2d 72; see R.C. 2113.31 (administrator is also chargeable with all the proceeds of personal and real estate sold for the payment of debts or legacies, and all the interest, profit, and income that in any way comes to his hands from the personal estate of the deceased). Appellant has provided no legal authority to support her argument that the rights to the royalties from the songs copyrighted after January 1, 1978, pass outside the decedent's estate and immediately vest with her and the children of Larry

Troutman. Thus, the court correctly held that the royalties from the post-1978 songs passed to the estate of Larry Troutman upon his death intestate.

Additionally, "the Copyright Act also provides a process for terminating transfers of any copyright interest executed on or after January 1, 1978. [17 U.S.C.] § 203(a). Under § 203(a), the surviving spouse and the children of a deceased author may terminate any conveyance of a copyright interest executed on or after January 1, 1978, by the author of the copyrighted work. *** The termination interest may be exercised beginning thirty-five years from the date of the execution of the conveyance and continuing for a period of five years 203(a)." *Broadcast Music, Inc. v. Roger Miller Music, Inc.* (C.A.6, 2005) 396 F.3d 762.

Pursuant to 17 U.S.C.§ 203, the right to terminate the transfers of the copyrights immediately vested in appellant and her children upon the death of Larry

Troutman. Neither appellant nor her children, however, may exercise their right to terminate the transfers of the copyrights until thirty-five years have passed from the date of the execution of the grants. Since 17 U.S.C. § 203(a)(3) applies only to transfers executed on or after January 1, 1978, appellant cannot exercise her right of termination until 2013, at the earliest. Upon termination of the transfers in 2013, the right to receive royalties from the songs copyrights will immediately vest in and become payable to appellant and her children born from her marriage to Larry Troutman.

Appellant's sole assignment of error is overruled.

III

Appellant's sole assignment of error having been overruled, the judgment of trial court is affirmed.

.....

FAIN, J. and VUKOVICH, J. concur.

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DIVISION
MONTGOMERY COUNTY

Lynette Troutman,	:	**C.A. No. 23699**
		T.C. No. 2008MSC00081
Plaintiff-Appellant,	:	
v.		**FINAL ENTRY**
	:	
Estate of Roger Troutman, et al.	:	
Defendants-Appellees.	:	
Filed in the Court of Appeals August 13, 2010	:	
Gregory A. Brush Clerk of Courts, Montgomery Co. Ohio	:	

Pursuant to the opinion of this court rendered on the 13th day of August, 2010, the judgment of the trial court is affirmed.

Costs to be paid as stated in App. R. 24.

s/ Mary E. Donovan
MARY E. DONOVAN
Presiding Judge

s/ Mike Fain
MIKE FAIN, Judge

s/ Joseph J. Vukovich
JOSEPH J. VUKOVICH
Judge (Sitting by assignment
of the Chief Justice of the
Supreme Court of Ohio

APPENDIX E

IN THE SUPREME COURT OF OHIO

Lynette Troutman,	:	
Plaintiff-Appellant,	:	
v.		**Case No. 2010-1661**
	:	
Estate of Roger Troutman, et al.	:	**ENTRY**
Defendants-Appellees.	:	
Filed in the Supreme Court of Ohio December 29, 2010	:	
	:	
Clerk of Court, Supreme Court of Ohio	:	

Upon consideration of the jurisdictional memorandum filed in this case, the Court declines to hear the case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional

question.

(Montgomery County Court of Appeals; No. 23699)

s/ Eric Brown
Eric Brown, Chief Justice

APPENDIX F

PROBATE COURT OF MONTGOMERY COUNTY, OHIO

Estate of Larry Troutman, Deceased,
Case No. 2000EST330524

Filed Probate Court
April 24, 2000
George J. Gounaris,
Probate Judge
Montgomery County,

CLAIMS OF CREDITORS

To: William A. Sherman, Special Administrator

William A. Sherman, of Cincinnati, Ohio, hereby presents his claim against the estate of Larry Troutman, deceased, in the amount of $ 50,000,000.00 which is based on the following: William Sherman as agent for Rufus Troutman, Administrator of the Estate of Roger Troutman.

Received on April 24, 2000.

s/ William A. Sherman,
William A. Sherman, Fiduciary,
Estate of Larry Troutman

Affidavit Supporting Claim

I have presented a claim against the estate of Larry Troutman, deceased, in the amount of $ 50,000,000.00, which is based on the following: (Complaint attached).

I certify that the claim is justly due, that no payments have been made thereon, that there are no counterclaims against it to my knowledge, and that it is unsecured.

s/ William A. Sherman,
Claimant, Agent for Rufus Troutman, Administrator of the Estate of the Estate of Roger Troutman

Sworn to and signed before me on April 24, 2000.

s/ J. Timothy Cline, Jr.,
Attorney at Law, Notary Public

(Attachment)

COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

**Estate of Roger Troutman, Deceased,
by Rufus Troutman, Administrator of the
Estate of Roger Troutman,**

Case No. _____

Plaintiff,

v.

**Estate of Larry Troutman, Deceased, and
Unknown Administrator of the Estate of
Larry Troutman,**

Defendants.

COMPLAINT

Now comes Plaintiff, the Estate of Roger Troutman, Deceased, and Rufus Troutman, as Administrator, by their attorneys and states as its Complaint against the Estate of Larry Troutman as follows:

FACTS

1. That on April 25, 1999 Larry Troutman, in the City of Dayton, Montgomery County, Ohio did intentionally and wrongfully cause the death of Roger Troutman.

2. That Larry Troutman, without justification or provocation, did intentionally discharge a firearm with the purpose to shoot Roger Troutman, and as a result, did inflict wounds upon him causing his death.

3. This matter was investigated by the City of Dayton Police Department.

4. Their Investigation revealed that Roger Troutman had been shot several times and as a result of these gun shot wounds he died.

5. Larry Troutman was found in his automobile with a single gun shot wound to his head, as as a result thereof died.

6. The ballistics tests revealed that the projectiles which caused the death of Roger Troutman were, in fact, fired from the firearm which was found in the automobile of Larry Troutman.

7. That the projectile which caused the death of Larry Troutman was also fired from the firearm which was

found in the automobile of Larry Troutman.

8. Further investigation of the facts and circumstances surrounding the deaths of these two men, lead the City of Dayton Police Department to conclude that Larry Troutman caused the death of Roger Troutman and there is no evidence to suggest otherwise.

9. Roger Troutman, during his lifetime became, and remained until the time of his death, a multi-talented and widely popular musician and recording artist.

10. During his lifetime Roger Troutman wrote, composed, recorded and performed hundreds of songs beginning in the mid 1970s through the time of his death.

11. At the time of his death he had contractual obligations to Warner Brothers Recording Company to record and produce music which had the potential to earn him millions of dollars.

12. That also at the time of this death Roger Troutman

had agreements and commitments to record and produce various popular artists which also would have earned him significant income totaling hundreds of thousands of dollars.

COUNT ONE-WRONGFUL DEATH

13. Plaintiff incorporates by reference each allegation contained in the paragraphs 1 through 12 as if fully rewritten herein.

14. That Larry Troutman did intentionally and wrongfully take the life of Roger Troutman.

15. That as a result of the wrongful taking of the life of Roger Troutman, he and his estate have been deprived of the income which would have been earned by his continued fulfillment of contractual obligations to record, produce and perform music.

WHEREFORE, since the future earning potential of Roger Troutman is virtually incalculable thoughout the period of his life expectancy, Plaintiffs are requesting this

Court to award the Estate of Roger Troutman $ 50,000,000.00 from the Estate of Larry Troutman, or in the Alternative, award the Estate of Roger Troutman all assets of the Estate of Larry Troutman and all income of to be earned by the Estate of Larry Troutman in the future and forever and any other legal and equitable relief this court may deem just.

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Trial Attorney for the Estate of
Roger Troutman

APPENDIX G

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DIVISION
MONTGOMERY COUNTY

Lynette Troutman,	: C.A. No. 23699 T.C. No. 2008MSC00081
Plaintiff-Appellant,	: (Montgomery County
v.	Probate Court)
	:
Estate of Roger Troutman, et al.	:
Defendants-Appellees.	:
Filed in the Court of Appeals January 22, 2010	:
Gregory A. Brush Clerk of Courts, Montgomery Co. Ohio	:

BRIEF OF APPELLANT, LYNETTE TROUTMAN

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ASSIGNMENT OF ERROR

The Trial Court's Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part filed on or about August 21, 2008, wherein the Court ruled that the surviving spouse and children had no present interest in royalties was in error as there were genuine issues of material fact, and the same was contrary to federal copyright laws which were enacted to protect the author and his family.

ISSUE PRESENTED FOR REVIEW

Whether or not the Trial Court's Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part was contrary to federal copyright laws, in light of the Court's holding that royalties relating to post-1978 copyrights were properly payable to the Decedent's Estate (and essentially, to

creditors of the Estate) and not to deceased author's surviving spouse and children.

STATEMENT OF THE CASE

This appeal relates to a Complaint For Declaratory Judgment regarding the transfer and ownership of the deceased author's interest in certain copyrights and royalties payable therefrom. Some of the relevant code sections include 17 USC sections 101, 106, 201, 203, 205, 302, and 304. The United States Constitution is also cited in this appeal. The purpose of the Verified Complaint was to get the Court to rule that royalties, in excess of $722,000.00, had vested in the Plaintiff, Lynette Troutman, and the children of the Decedent, Larry Troutman, a famous musician. The Trial Court denied the Complaint, essentially in its entirety, ruling that the surviving spouse and children had no vested present interest in royalties payable on account of post-1978 copyrights (the Decedent had only 1 pre-1978 copyright

which did not pay royalties), because the termination interest in these copyrights had not yet vested in them. An effect of this erroneous ruling may be to allow the Administrator De Bonis Non, Michael Conway, to collect the royalties for the benefit of the wrongful death claimants, being the heirs of

the Decedent's deceased brother, Roger Troutman, who the Decedent had shot and killed. This appeal ensued because the Trial Court's Decision was contrary to federal copyright laws.

STATEMENT OF FACTS

Plaintiff, Lynette Troutman, is the surviving spouse of Larry Troutman, Deceased. In, or about, 1977, the Decedent, and his brothers, Terry Lester, and Roger Troutman, formed the Zap Band. Many of their songs were successful, and they may have executed contracts with music promoters such as BMI, Inc., La Strada, Inc., and others, to promote, and

distribute their music. The band members were paid royalties for the exploitation of their music. In 1981, Larry Troutman, Deceased, married, Lynette Troutman, the Appellant herein, and two children were born of the marriage. The Decedent had 5 other children, however, according to the Form 1.0 surviving spouse, children, next of kin, legatees and devisees, filed in Case Nos. 2002EST341772 (Michael Conway, Administrator DBN), and 2000EST332899 (Lynette Troutman, Administratrix).

The inventory which was filed in Case No. 2000 EST 332899, which has now been substantially merged with Case No. 2002EST341772 , shows assets of $1,000.00 in tangible assets and $722,188.70 in royalty income.

On or about April 25, 1999, Larry Troutman, Deceased, shot and killed his brother, Roger Troutman, and then took his own life. A claim was presented against the Estate of Larry Troutman, Deceased, and there is a wrongful death action

which is currently pending in the Montgomery County Common Pleas Court (see, Case No. 2001CV2153). The matter was apparently settled, however, and the fiduciary of the Estate of Larry Troutman may have agreed to pay the settlement using royalty proceeds. Of course, this agreement is lacks consideration, and is void. The Verified Complaint filed in this matter stated that object of the wrongful death action was to attach '...all assets and income to be earned by the estate of Larry Troutman...' Plaintiff, Lynette Troutman, filed her Verified Complaint on March 14, 2008, to prevent the attachment of royalties by the Estate of Roger Troutman. Rufus Troutman, Administrator of the Estate of Roger Troutman, by and through counsel, filed a motion to dismiss for failure to state a claim pursuant to Civ. R. 12(B)(6), on or about April 10, 2008. The Motion to Dismissed was treated as a motion for summary judgment regarding the ownership of Decedent's termination interest in certain copyrights, and

royalties flowing therefrom. On August 21, 2008, the Court granted summary judgment in favor of the Estate of Roger Troutman, ruling that because the Plaintiff's termination interest in the copyrights was not presently vested, and would not vest until 2013, in regards to post-1978 copyrights, the royalties were properly payable to the Estate. In so ruling the Court completely misapplied the applicable laws, and overlooked nearly two hundred years of precedents, and clear congressional content. Plaintiff filed her timely Notice of Appeal on September 22, 2008. However, this appeal was dismissed for lack of a final appealable order. The matter was remanded, and Plaintiff filed a Motion To Reconsider on or about June 10, 2010. This motion was denied on or about July 28, 2009. On September 25, 2009, the Trail Court issued a final appealable order which correctly ruled that the Decedent's sole pre 1978 copyright and the royalties resulting therefrom,

belonged to the surviving spouse and children. On Oct 16, 2009, Appellant filed her Notice of Appeal to challenge the Entry filed on 8/21/08. This cause is now before this Distinguished and Honorable Court for review.

ARGUMENT

The Trial Court's Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part filed on August 21, 2008, wherein the Court ruled that the surviving spouse and children had no present interest in royalties was in error as there were genuine issues of material fact, and the same was contrary to federal copyright laws which were enacted to protect the author and his family. Congress has long recognized the fact that a naive author may sell his copyrights for a small sum. Consequently, reform in the area of copyrights tend to be for the purpose of protecting the author and his family. Stewart v. Abend, 495 U.S. 207 (1990). Though copyright has become largely a matter of

federal statutory law, principles of common law, as expressed in court rulings, are still very much a part of copyright jurisprudence. Much of the common law dealt with an author's renewal rights in copyrights where upon his death, a new estate was created in the surviving spouse and children. Beginning on January 1, 1978, congress created a new scheme, and introduced the concept of termination interest where upon the death of the author, his surviving spouse and children had the right to terminate a grant of an interest in copyrights, but only on the occurrence of certain events. This appeal deals solely with post-1978 copyrights, and thus

largely with the concept of termination. These issues will be further discussed below. The nature of an author's ownership interests in copyrights is seldom a problem during his life time. What is problematic, however, is his next of kins' ownership interests in these copyrights upon his death. This

difficulty is largely due to the fact that his interests in these copyrights may have been conveyed, or were the subject of a licensing agreement, entered into by the deceased author, and by other joint owners.

A resolution of these matters, forces us to consider issues relating to vesting, and the circumstances under which creditors of the deceased author's estate may exercise control over his exclusive interests in copyrights. Upon resolving these issues, it will become abundantly clear that the Trial Court's Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, was in error, as the evidence demonstrates that there were numerous triable issues of fact, and the Trial Court's interpretation and application of the law was incorrect, and contrary to clear congressional intent to provide for the author and his family.

Ohio Rule of Civil Procedure 56(C) states:

Summary judgment shall be rendered forthwith if the pleadings depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds

> can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. See, Harless v. Willis Day Warehousing Co., Inc., 54 Ohio St.2d 64 (1978). Any inferences to be drawn form the underlying facts must be viewed in the light most favorable to the party opposing the motion. Leibreich v. A.J. Refrigeration, Inc., 67 Ohio St.3d 266 (1993).

1. Vesting Of The Exclusive Rights In Post-1978

Copyrighted Works

The Trial Court erred as a matter of law in ruling that the surviving spouse and children did not have a present ownership interest in Decedent's copyrights because, despite the termination scheme applicable to post-1978 copyrights, the facts, evidence, and the applicable law demonstrate that the Decedent's exclusive interests in copyrights, including the right to sell protected works and to collect resulting royalties, became vested in his surviving spouse and children, immediately upon his death. This conclusion is due to the fact that the Movant produced no evidence to prove that the Decedent had executed a transfer or a license of his copyrighted works.

In regards to ownership of copyrights, Title 17, Section 201, in part, reads as follows:

> (a) Inital Ownership. Copyright in a work protected under this title vests initially

in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

. . . . . .

(d) Transfer of Ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate of succession.

(2) Any of the exclusive rights comprised in a copyright, **including any subdivision of any of the rights specified by section 106,** may be transferred as provided by clause (1) and owned separately. The owner of

> any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

In the Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, in addressing "works copyrighted post-1978", the Trial Court stated: "Consequently, ownership interests does not vest until the termination date." I disagree: In the case at bar, the Decedent's copyright ownership interest vested in the spouse and children immediately upon his death due to the fact that the author **conveyed** no interest in copyrights, and thus no necessity to terminate arose as a result of his death. Summary judgment was improper as a matter of law, and based on the facts of the case.

In a very important case involving copyrights, the Court stated:

> For works copyrighted on or after January 1, 1978, Congress abandoned the renewal copyright scheme because of its complexity and instead provided for a system where the copyright endured for the life of the author plus a term of years. Broadcast Music, Inc., v. Roger Miller Music, Inc., 396 F.3d 762 (2005) [(citing 17 U.S.C. section 302 (a)].

The Court also stated that, any conveyance of a copyright interests executed on or after January 1, 1978, is subject to termination by the author, or his next of kin, pursuant to section 203. Id.

The Trial Court's September 25, 2009, Entry And Decision Declaring Royalties Belong To The Estate of Larry Troutman, in regards to the Decedent's single pre-1978

work, is consistent with the ruling in *Broadcast Music*. The Trial Court further stated that Decedent's surviving spouse and children were the owners of all royalties resulting from this single pre-1978 work. Id. To show the pyrrhic nature of the victory, the Trial Court continued: "However, the Estate has received no payments from this work." Id. The Court's rationale, and the explanation for the difference between the August 21, 2008 Entry denying the surviving spouse and children the right to obtain royalties and the September 25, 2009 Entry ruling that the surviving spouse and children did own royalties, appears to be because the August 21, 2008 ruling had to do with post-1978 copyrights which were to vest in the future, upon termination, while the September 25, 2009 ruling that royalties were presently payable to the surviving spouse and children, had to do with pre-1978 copyrights which renewed and created a new estate in the Decedent's surviving spouse and children immediately upon

his death. Unfortunately, the Trial Court's reasoning is only partially correct.

In the Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, the Trial Court granted summary judgment in favor of Estate of Roger Troutman, ruling that the royalties belonged to Decedent's Estate, because the date of termination had not yet arrived. Id. At p. 4. The Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, read in part as follows:

> Thus, the individuals who receive the deceased termination Interest will receive ownership interest but not until the Date of termination. If (emphasis added) the Zap Band assigned their interests in 1978, the termination period would not

> begin until 2013. Thus, the royalties would be properly payable to the estate because the spouse and children could not at this time exercise their contingent termination interest. Id. at p.3.

This statement properly reveals that summary judgment was improper. The Trial Court made the assumption that the Decedent, The Zap Band, and or other band members, assigned their interest in copyrights. The Movant presented no facts to show that the Decedent ever assigned his interest in his extensive post-1978 works. In the context of a summary judgment, there is simply no room for assumptions. Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Leibreich v. A.J. Refrigeration, Inc., 67 Ohio St.3d 266 (1993). The issue of

whether or not the Decedent's interest was properly assignment created a triable issue of fact which made the grant of summary judgment inappropriate as a matter of law. In the Estate of Larry Troutman's Memorandum Regarding Motion To Dismiss, filed on June 24, 2008, attached thereto as Exhibit "B", we see that Decedent's name was listed on approximately 91 pages of copyrighted material, and perhaps on as many as 1,130 copyrights were registered partly in the name of the Decedent. Many of these **joint works** were registered with the Decedent's brother Roger Troutman, also deceased. The abstract of copyrights, which is self-authenticating. Id. does not reveal any assignments of these works to BMI, Inc., La Strada, Inc., nor anyone else. See. Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, at p.2. At best, the evidence proved that BMI, Inc., La Strada, Inc., may have been the recipient of an oral grant of a

license which may have expired by it's terms, and which may have been invalid pursuant to Ohio law, as being in violation of the Ohio statute of frauds. Thus the terms of the alleged license to BMI, Inc., and La Strada, Inc., were material facts that the Trail Court needed to know before granting summary judgment against the Appellant.

The Trial Court's assumption that these extensive copyrights were assigned led to a fatal flaw in the Court's analysis. This is due to the fact that absent, a valid assignment on the behalf of the Decedent, his interest in copyrights did not pass to BMI, Inc., nor to La Strada, Inc.,. **As such, upon the death of Larry Troutman, his interest in post-1978 copyrights, not having been conveyed to others, IMMEDIATELY VESTED** in his surviving spouse and children as a matter of federal law, pursuant to section 201 (d) and federal common law. An author may assign his interests in copyrights to others or keep them for his own

purpose. Wright County Library Board v. Harper Collins Publishers, Inc., 2000 U.S. Dist. LEXIS 22780. Also see, Desylva v. Ballentine, 351 U.S. 570 (1956), wherein the Supreme Court affirms the validity of common law, and cites Section 88 of the Copyright Act of 1870 for the proposition that where the author is deceased, his widow and children "...shall have the same exclusive right continued..." Congress has changed this renewal provision over the years, but only with the purpose of protecting the author while he is alive, and for providing for his family after his death. In this regard, since the author cannot assign his family's renewal rights, these rights take the for of a " compulsory bequest" of the copyright of the family. Id. This argument was made in the Complaint filed in the trial court on or about March 14, 2008.

So, the nature, and extent to which an assignment may be attributable to Decedent's joint interests in post-1978

copyrights, created a genuine issue of material fact making summary judgment in favor of the Movant, inappropriate pursuant to Civ. R. 56. An analysis of the applicable law shows why it was factually and legally indispensable for the Trial Court to ascertain whether or not the Decedent executed a grant of a transfer or license in regards to any of his exclusive rights in copyrights.

Title 17 U.S.C. section 101 defines a "transfer of copyright ownership" as:

> An assignment, mortgage, exclusive license, or any other conveyance, alienation, hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, **but not including a nonexclusive license** (emphasis

added).

Additionally, the authors of a joint work are coowners of copyrights in the work, pursuant to section 201 (a), and upon their death, these copyrights may pass to the surviving spouse and children as personal property (as opposed to an interest in land) pursuant to section 201 (d). Also see, Desylva v. Ballentine, 351 U.S. 570 (1956). When construing a legislative enactment, courts are to give effect to the intention of the legislature adopting the statute, provision, or section in question. Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993). Furthermore, courts are to make a good faith effort to interpret provisions so that other provisions in the statute are not rendered inconsistent or meaningless. Cafarelli v. Yancy, 226 F.3d 492 (6th Cir. 2000). Finally, courts are to avoid interpretations that would produce an absurd result where another construction, which is more appropriate in light of legislative purpose, is

available. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). In the 1976 amendments to the Copyright Act, Congress attempted to restore to authors, their heirs, and assigneds, a second opportunity to recapture copyrights. Broadcast Music, Inc., v. Roger Miller Music, Inc., 396 F.3d 762 (2005). The Trial Courts view that the individuals who receive the deceased termination interest will receive ownership interest but not until the date of termination in 2013, allowing the surviving spouse and children to starve until this time, is contrary to the spirit of the 1976 amendments. Also, this is an interpretation that also has the potential of producing an absurd result in that **the termination interest may in fact never, ever vest.** See, Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, p. 3. Pursuant to section 203(a)(1), the exclusive or nonexclusive grant of a transfer or license of copyright or of any right

under a copyright, **executed by the author** on or after January 1, 1978, is subject to termination by a **majority** of the authors who executed it, or by their next of kin, collectively, if the author or authors be deceased. According to the Trail Court's rationale, if the **alleged** nonexclusive grant of a license to BMI, Inc., and LaStrada, Inc., in post-1978 copyrights was executed by Roger Troutman and Larry Troutman, both deceased, (Larry having killed Roger, and Roger's heir's having obtained a judgment for the wrongful death). Roger's next of kin would wisely refuse to join in the termination with Larry's next of kin; without the requisite "majority", Larry's joint interest in these copyrights would become part of the public domain – without Larry's surviving spouse and children seeing as much as a red cent of royalty proceeds. This seems to be an absurd result, and is absolutely contrary to over two hundred years of Congress' attempt to protect the author, and his surviving spouse and

children.

Additionally, The Trial Court's ruling is erroneous in that the Court assumed that the alleged license was executed by the Decedent, Larry Troutman. At trial, the evidence may have proven that there was no valid license in regards to post-1978 copyrights. Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Leibreich v. A.J. Refrigeration, Inc., 67 Ohio St. 3d 266 (1993). It is entirely possible that license was to expire, by its terms, of a joint author. It is entirely possible that the license was not signed at all, and the agreement, if any, is in violation the Ohio Statute of Frauds and revocable. This lack of knowing the details of the alleged license was discussed in Third-Party Defendant Lace Dior Love Troutman's Memorandum Opposing The Motion Of The Estate of Roger Troutman, p. 7, filed on June 25, 2008. It was error for the Trial Court to

gloss over the terms of the license, and failing to ascertain the extent to which these terms may have affected the termination interest outlined in section 203. Please note that, a transfer of copyright ownership, other than by operation of law, must be in writing and signed by the owner, section 204.There is no evidence that this occurred. Also, a license, if one was in fact signed, may be revocable by its terms. The Dall Motor Parts Co. V. The Packard Motor Car Co., 124 Ohio St. 363 (1931).

The abstract of copyrights attached to Estate Of Larry Troutman's Memorandum Regarding Motion To Dismiss, Exhibit "B", fails to reveal any transfer of the Decedent's exclusive rights in copyrights (see, section 106) which may be recorded pursuant to section 205. Please keep in mind the fact that a 'transfer of copyright ownership' (see, section 101, definitions) does not include the alleged nonexclusive grant to BMI, Inc., and La Strada, Inc. This point must not be

taken lightly: In the absence of an executed transfer of copyright, Larry Troutman died with a fee simple interest in all of his section 106 exclusive rights in copyrights. These exclusive rights passed to his surviving spouse and children immediately upon his death, (as) a matter of federal law.

The necessity of the incident of termination in his next of kin, pursuant to section 203, did not arise in regards to any of these section 106 exclusive rights. Thus, we see vestiges of the commonly law in post-1978 copyrights, in that all of the Decedent's exclusive rights of copyrights, including reproduction, and sale, and collection of royalties therefrom, necessarily vest in the surviving spouse and children pursuant to section 201(d). Also see, DeSylva v. Ballentine, 351 U.S. 570 (1956) for the proposition that upon the death of an author, his interest in copyrights take the form of a "compulsory bequest" of the copyright to his family. Section 201 (d)(2) reads as follows:

> Any of the exclusive rights comprised in a copyright, **including any subdivision of any of the rights specified by section 106**, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is **entitled, to the extent of that right, to all of the protection and remedies** accorded to the copyright owner by this title (emphasis added).

Section 106 (3) gives the owner of a copyright the "exclusive rights to do and to authorize" the distribution and sale of copyrighted works to the public in exchange for royalties. As the owners of all Decedent's section 106 exclusive rights, the surviving spouse and children are the only ones who are

authorized to permit BMI, Inc., La Strada, Inc., and any other company, or person, to sell copyrighted works. The corollary is that only the surviving spouse and children are allowed to get royalties in association with the sale of copyrighted works. Michael Conway, Administrator of the Estate of Larry Troutman, Deceased, may not authorize the sale of protected products, and may not obtain royalties resulting from the exercise of this exclusive right. Whether or not the section 203 termination interest has fully vested in the surviving spouse and children, or is yet inchoate, is utterly irrelevant. The right of termination is an important aspect of the 1978 revisions to the Copyright Act. "A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." House Report No. 94-1476. See, Motion To Dismiss filed on April 11, 2008, (Exhibit "A") attached at

p. 8. The right of termination, even before it has fully vested, gives the author, or his surviving spouse and children, if he be deceased, the opportunity to see how, and to make sure the work is being properly exploited. This allows the holder of the termination interest to assess whether or not the grant of a license or transfer is remunerative. This assessment can be made though the termination has not yet vested. If the recipient of the transfer or license is slacking, or paying insufficient royalties, the said transfer or license will be terminated upon the vesting of the termination interest. This right gives the author the power to police the bargain, with the threat of termination at his disposal. The Trial Court's conclusion in the Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, p. 3, stating: "Thus, royalties would be properly payable to the estate because the spouse and children could not at this time exercise the contingent termination

interest..." is a clear case

of judicial activism, as there is no case law, nor legislative history to even imply that the vesting to the termination interest is a condition precedent to the payment of royalties in the matter before this Honorable Court.

It may be argued that the alleged nonexclusive licenses to BMI, Inc., and La Strada, Inc., may still be enforceable by its terms. This may be true, but we do not know their terms. Furthermore, even if the license is valid, this does not mean that the surviving spouse and children should not be collecting the royalties payable therefrom, until the termination interest has been vested in them in 2013, or whenever. As argued above, the surviving spouse and children own a vested interest in all of Decedent's section 106 exclusive rights in copyrights, and the contractual or equitable right be paid royalties. The nature of a copyright is such that there may be a legal interest and a beneficial or

equitable interest, and both of these interests may exist at the same time, in different persons; this occurs when an author has assigned his legal interest in copyrights for exploitation, in exchange for a beneficial interest to receive royalties. Yount v. Acuff-Rose-Opryland, 103 F. 3d 830 (1996). As argued above, where a deceased author did not transfer an interest in copyrights, but is in fact receiving royalties, as in the case at bar, his equitable right to receive royalties, passes "by operation of law" to his heirs pursuant to section 201 (d) (1). Furthermore, such an "exclusive right" to receive royalties may pass to said heirs and be "owned separately by them". Section 201 (d)(2). A fiduciary need not be appointed. Also see, In re Waterson, Berlin & Snyder, Co., 48 F.2d 704 (2d. Cir. 1931), for the proposition that **the obligation to pay royalties can not be severed from the ownership of the copyright itself.** Consequently, the Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part,

wherein the Trial Court ruled that the surviving spouse and children were not entitled to royalties payable on account of the Decedent's interest in post-1978 copyrights, was contrary to Congress' attempt to protect the most vulnerable members of our society, these being the surviving spouse and children.

2. Rights of Creditors In Vested Post-1978 Copyrighted Works

Having established that the Decedent's interest in copyrights passed to his heirs immediately at death, by operation of federal law, and that the right to receive royalties can not be separated from the ownership of the underlying copyright, it follows that creditors of the Estate have no right to obtain satisfaction of their claim from royalty proceeds. The following may shed some light on this issue:

> Involuntary Transfer. When an individual author's ownership of a copyright, **or of any of the exclu-**

> **sive rights** under a copyright, has not previously been transferred vountarily by that individual author, **no action by any governmental body or other official** or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, or any of the exclusive rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, **except as provided under title 11** (emphasis added). 17 U.S.C. section 201 (e).

Congress chose to allow the author's interest in copyrights

be subject to the claims his creditors in bankruptcy (title 11), but not to the claims of creditors in any other setting, including probate. The principle of *expressio unius est exclusio alterius* is very appropriate in resolving of the rights of an author's creditors. Congress, and not the courts, have the right to"...promote the progress of science and useful arts, by securing for limited time **to authors and inventors the exclusive right** (emphasis added) to their respective writings and discoveries..." U.S. Const., Art. 1, Section 8, cl.8. Pursuant to section 106 (1) and (3), only the author may authorize the copying and sale of copyrighted works. Any ruling which allows others besides the author, and or his next of kin, to exercise dominion and control over any of these exclusive rights, is in violation of the United States Constitution.

In the Motion To Dismiss filed on April 11, 2008, p. 2, Appellee, who may be currently working on motions

pursuant to App. R. 23, stated in regards to 17 U.S.C. sections 201, 203, 302 and 304, that "...there is absolutely no support of authority in line with Plaintiff's interpretation of the statute." I disagree. "Section 203 reflects a practical compromise that **will further the objectives of the copyright law** (emphasis added) while recognizing the problems and legitimate needs of all interests involved. Id. at Exhibit "A" (House Report No. 94-1476), page 9 of 22. Appellee is well aware of the fact that Congress has always intended to give authors, who may have been in a poor bargaining position initially, and their surviving spouse and children, who will necessarily be in a poor bargaining position upon his death, the ability to terminate "unremunerative transfers" and to provide for his family upon his death. Appellee also contends that RC 2113.31 requires the Administrator to collect royalties. I disagree. The Administrator is only chargeable with assets "...of the

deceased which come into hands and are to be administered..." Id. In the case at bar, no one told the Administrator to collect royalty proceeds; on the contrary, it appears that he quite took that upon himself. As argued herein, the section 106 exclusive rights in copyrights pass to the surviving spouse and children upon the death of the author, and may be owned separately by them pursuant to section 201(d). The royalties simply did not come into the hands of the Administrator to be administered, but passed outside of the estate. The following are important principles of copyright law.

> The estate of an author is not designated as a beneficiary and the renewal expectancy, prior to its exercise, cannot be reached by creditors of the author .....
> .....If the author dies before

> the 28th year, the renewal expectancy does not pass to the author or his estate, but by statute passes to the alternate designated statutory beneficiary. Hill & Range Songs, Inc., v. Fred Rose Music, Inc., 403 F. Supp. 420 (1975).

Of course, these principles were stated in a case dealing with pre-1978 copyrights; nonetheless, the 1978 amendments were intended to "further" not restrict the objective of protecting the author and his family. Why should Congress' introduction of the concept of "termination interest" as shown in section 203, change such important principles of copyright law? So, we see that the rights of creditors in regards to a deceased author's exclusive rights in copyrights, are limited.

In the Entry Denying Motion For Reconsideration filed

on July 28, 2009, p. 4, the Trial Court found that section 201 (e) did not apply to the enforcement of the judgment and settlement agreement entered into by the fiduciaries of the Estates of Larry and Roger Troutman (Larry's Estate was sued for the wrongful death of Roger). I disagree. The Administrator De Bonis Non of the Estate of Larry Troutman and the Trail Court, had Appellant removed as the Administrator of her husband's Estate. He then set himself up to take royalties belonging to the surviving spouse and children. This is, and continues to be, an act of infringement. Simply because the fiduciary is in possession of property wherein the Decedent had an ownership interest does not mean that this property may be included in the inventory. See, Hoover v. Hoover, 90 Ohio App. 148 (1950) wherein the court stated: Nowhere is any authority given an administrator to administer or as administrator to receive property of heirs or next of kin". Also see, DeSylva v.

Ballentine, 351 U.S. 570 (1956) for the proposition that upon the death of an author, his interest in copyrights take the for of a "compulsory bequest" of the copyright to this family. If the settlement agreement is to be enforced, the proceeds can not come from royalties which are now owned by the surviving spouse and children as the owners of all of Decedent's exclusive interests in copyrights pursuant to sections 106 and 201. Neither the interests in copyrights, nor the royalties flowing therefrom, belonged to the Decedent upon his death, but passed immediately and vested in his surviving spouse and children. This being the case, there is no *res* from which judgment creditors and the Estate of Roger Troutman, may be paid. A judgment creditor can acquire no greater interest in money or property than the judgment debtor own, but takes derivatively through him. Brusman v. Susanjar, 113 Ohio App. 544 (1960).

Section 201 (e) allows **consensual** creditors to exercise

ownership interests in an author's copyrights and royalties. Congress had made an exception for bankruptcy, so that the trustee in bankruptcy, a nonconsensual creditor, is allowed to collect copyrights and royalties for the benefit of creditors. Nonetheless, Congress has not given any other nonconsensual creditors this right. Of course, this is Congress' prerogative. The fact of the matter is that Larry Troutman, Deceased, has not transferred any of his exclusive rights under a copyright. Pursuant to section 201(e), no government, nor official, may seize any of his exclusive interests in copyrights, nor the privileges associated therewith. This would prevent the Administrator, the Trial Court, the Governor, and any other official, from enforcing a judgment against royalties. The fact that the author is deceased does not invite a new reading of the statute. On the contrary, the fact that he is deceased is even more of a reason to read section 201(e) plainly, so that the surviving spouse

and children can be protected. Would this not further the objectives of the copyright laws? In any event, the United States Constitution, and the laws made in pursuance thereof, shall be the supreme Law of the Land. U.S. Const. Art. VI [2]. With this proposition, there can be no question.

CONCLUSION

In conclusion, the Trial Court's Entry Granting Summary Judgment In Part And Denying Summary Judgment In Part, filed on August 21, 2008, was in error because there were numerous triable issues of fact, and the ruling that royalty proceeds were not immediately payable to the surviving spouse and children, was contrary to clear congressional mandate, and applicable law.

WHEREFORE, the undersigned requests that the said Entry be reversed, and the matter remanded.

s/ Worrell A. Reid
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Attorney for Appellant

No. 10-1181

In The

Supreme Court of the United States

LYNETTE TROUTMAN,

Petitioner,

v.

ESTATE OF ROGER TROUTMAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For Montgomery County, Ohio, Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW BY PETITIONER

Whether or not the decision of the Court of Appeals that a deceased author's interest in royalties attributable to post-1978 copyrights passed to the administrator as personal property which may be distributed to the deceased author's creditors, leaving the surviving spouse and children destitute, is consistent with applicable federal law.

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STATEMENT OF THE CASE

This case was precipitated by Larry Troutman's homicide of his brother, Roger Troutman, and Larry Troutman's subsequent suicide. The brothers had been heavily involved in the music industry, and each had significant copyrights generating streams of royalty income to each of them. These royalty payments continue to the present day (see Entry Granting Summary Judgment In Part and Denying Summary Judgment In Part, Petitioner's Appendix A, App. 1).

In the course of the litigation, the Montgomery County, Ohio, Probate Court found that all but one of Larry Troutman's copyrights post-date January 1, 1978, and the single pre-1978 song has generated no royalties (see Entry, Petitioner's Appendix A, App. 1 and Entry and Decision Declaring Royalties Belong to the Estate of Larry Troutman, Petitioner's Appendix B, App. 9).

Roger Troutman's estate made a wrongful death claim against the Larry Troutman estate which matter was later settled by an agreement to pay two-thirds of all amounts received by the Estate after payment of statutorily-required priority payments. The Probate Court approved this settlement on April 11, 2008 (see Notification of Proposed Settlement Agreements, attached hereto as Appendix A, App. 1 and Order authorizing settlement, attached hereto as Appendix B, App. 24).

On March 14, 2008, Larry Troutman's widow, Petitioner Lynette Troutman, filed the instant action, claiming that the copyrights owned by Larry Troutman before his death were to pass to his heirs rather

than to his estate, based on an admixture of claimed constitutional law and case law predating the 1976 Copyright Act. While Lynette Troutman points out in her Petition for Writ of Certiorari that she received payments from the recording companies directly for a period of time, such payments were precipitated by Lynette Troutman's representation to the recording companies that she was entitled to receive such royalties. When the administrator de bonis non of the estate of Larry Troutman, Michael Conway, was appointed, he informed the recording companies of his appointment and the royalties from that time have been paid into the Larry Troutman estate.

In fact, as demonstrated below, under the current copyright law the Larry Troutman estate is the appropriate recipient of such royalties until Larry Troutman's heirs are entitled to exercise their termination rights under the copyright statute, beginning in 2013. Until that time, the copyright laws are clear that the estate, and not the heirs, is the appropriate recipient of such royalties.

THE INSTANT CASE DOES NOT WARRANT REVIEW BY THIS COURT

Given the clarity of the copyright law and the fact that none of the accepted reasons for a grant of certiorari are present in this case, this Court should deny Petitioner's request for Writ of Certiorari.

A. Existing copyright law is clear, and has been uniformly interpreted, to require that royalties currently be paid to the Larry Troutman estate and not directly to his heirs.

Federal copyright law and Ohio probate law expressly address the situation herein and provide that presently Appellant only has an interest in the copyright revenue stream through distributions from Larry Troutman's estate.

Copyright ownership essentially consists of a bundle of rights such as the right to reproduce the copyrighted works, distribute copies of the copyrighted work, and perform the copyrighted work. 17 U.S.C. § 106(1, 3, 4). Any of these rights may be transferred by a copyright owner by any means of conveyance. 17 U.S.C. § 201(d). As stated in the legislative comments to this section:

> "The principle of unlimited alienability of copyright is stated in the clause (1) of Section 201(d). Under that provision the ownership of a copyright, or any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property on the death of the owner . . .
>
> Clause (2) of subsection (d) . . . means that any of the exclusive rights that go to make up a copyright, including those enumerated in Section 106 and any subdivision of them,

> can be transferred and owned separately. . . ."

When such a transfer has taken place, copyright law gives the author or his statutorily-specified successor(s) the right to terminate the transfer or assignment (17 U.S.C. § 203). The preamble of 17 U.S.C. § 203 provides:

> "In the case of any work other than a work made for hire, the exclusive or non-exclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions: . . . "

Upon exercise of the termination right, all rights covered by the grants revert to the persons owning the termination interest (17 U.S.C. § 203(b)).

That section goes on to provide the precise method of termination by either the author (in 17 U.S.C. § 203(a)(1)) or specified heirs of the author after the author's death (17 U.S.C. § 203(a)(2)). 17 U.S.C. § 203(a)(3) provides that exercise of the right of termination may only take place between 35 and 40 years after the date of execution of the grant or, if the grant involves the right of publication, between 35 and 40 years from the date of publication of the work or execution of the grant, whichever occurs first (§ 203(a)(3)). Until the exercise of the termination rights, the grant continues for the term of the

copyright (17 U.S.C. § 203(b)(6)), which is the length of the author's life plus 70 years (17 U.S.C. § 302).

Under Ohio probate law, upon one's death the administrator of his estate takes title to any personal property and any income generated therefrom. *Winters Nat'l Bank v. Riffe*, 20 Ohio St. 2d 72, 206 N.E.2d 212 (1965). Such assets of the estate include choses in action. *Duvall v. Faulkner*, 113 Ohio St. 543, 149 N.E. 868 (1925). Indeed, 17 U.S.C. § 201(d)(1) provides in pertinent part: "The ownership of a copyright may . . . pass as personal property by the applicable laws of intestate succession." Until distribution, an Administrator de bonis non has the duty to collect assets and complete administration of the estate (*Bates v. Creed*, 2 Ohio App. 59 (Hamilton Cty., 1913)), including the payment of estate obligations (*In re Hirsch's Estate*, 146 Ohio St. 393, 66 N.E.2d 636 (1946)).

In the instant case, all of the royalty-paying copyrights owned by Larry Troutman post-date January 1, 1978. The earliest Appellant or decedent's children may exercise their rights of termination, then, is 35 years thereafter, or the year 2013. Accordingly, the lower court's October 26, 2009 Decision finding that the post-1978 copyrights and royalties presently belong to the estate of Larry Troutman is legally correct.

Not content with Congress' clear revision of the copyright laws to incorporate the "termination" concept rather than the earlier "renewal" concept, Petitioner complains:

> "Apparently the Ohio courts are of the view that the 1976 Act somehow changed copyright law in regards to the transfer of ownership and a decedent's interest in copyrights . . . The Petitioner is not convinced that this is the case. . . ." (Petition for Writ of Certiorari, pp. 16-17).

In fact, this is exactly what Congress intended, and did. Petitioner is merely dissatisfied with the result in the instant case, and for the sake of that dissatisfaction requests this Court to review and judicially recast copyright law to achieve Petitioner's desired result.

B. No Grounds For Issuing A Writ Of Certiorari Are Present In This Case

Supreme Court Rule 10 provides in pertinent part:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

> important federal question in a way that conflicts with relevant decisions of this Court."

As noted by this Court in *National Labor Relations Board v. Pittsburgh Steam Ship Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" (340 U.S. at 502).

As also noted by this Court:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectual interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or episodic." (*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1955)).

Given the clarity of the copyright laws involved in this case, this matter does not even rise to a level of academic or episodic interest. Petitioner points to no division between the circuits as to the interpretation or application of this copyright law, as in fact there is none. Petitioner does not point to any

substantive ambiguity or confusion in the law, but rather Petitioner complains only that applying the clear copyright law to the clear facts of this case, Petitioner will have to wait until her statutorily-provided termination rights mature.

CONCLUSION

This Court's review of this case will at best do nothing to clarify the already clear law in this area and will at worst judicially invalidate copyright laws which have worked well since their enactment. For both reasons, this Court should deny Petitioner's request for a Writ of Certiorari in this case.

Respectfully submitted,

DAVID M. RICKERT
DUNLEVEY MAHAN & FURRY

Counsel for Respondents
Estate of Larry Troutman
and W. Michael Conway,
Administrator De Bonis Non
of the Estate of Larry Troutman

APPENDIX

A – Notification of Proposed Settlement Agreements ..... App. 1

B – Order authorizing settlement ..... App. 24

APPENDIX A

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO CIVIL DIVISION

W. MICHAEL CONWAY, Plaintiff,	:	Case No. 2006-MSC-00330 (Judge McCollum)
v. LYNETTE TROUTMAN, et al. Defendant.	:	**NOTIFICATION OF PROPOSED SETTLEMENT AGREEMENTS** (Filed Jan. 11, 2008)

As referenced in this Court's December 12, 2007 Order, Plaintiff W. Michael Conway, Administrator De Bonis Non of the Estate of Larry Troutman has moved this Court for authority to enter into three different settlement agreements; specifically, a settlement of the wrongful death/survivorship claim by the Estate of Roger Troutman against the Estate of Larry Troutman ("Wrongful Death Settlement"), a settlement with the bonding company for Lynette W. Troutman as fiduciary of the estate of Larry Troutman ("Bonding Company Settlement"), and a settlement of the malpractice claim against the Estate of Charles Smiley, Jr. ("Malpractice Settlement"). In this Court's December 12, 2007 Order, the Court directed W. Michael Conway to serve all interested parties with the terms of the above-referenced proposed settlements.

Accordingly, W. Michael Conway hereby attaches a true and accurate copy of the proposed settlement agreement in the Wrongful Death Action as Exhibit A, a true and accurate copy of the proposed Bonding Company Settlement as Exhibit B, and a true and accurate copy of the proposed Malpractice Settlement as Exhibit C. Such proposed settlement agreements will be heard by this Court at the dates and times set forth in this Court's December 12, 2007 Order.

Respectfully submitted,

/s/ David M. Rickert

David M. Rickert (0010483)
COOLIDGE WALL FINLAY
JOHNSON & BEARD, LLC
260 North Detroit Street
Xenia, Ohio 45385
Phone: (937) 372-4411
Fax: (937) 372-4415
Email: rickert@coollaw.com

Attorney for Plaintiff
W. Michael Conway,
Administrator De Bonis
Non of the Estate of
Larry Troutman

[Certificate Of Service Omitted In Printing]

EXHIBIT A

SETTLEMENT AGREEMENT AND RELEASE

Rufus Troutman, as Administrator of the Estate of Roger Troutman, for the Estate of Roger Troutman and its heirs, executors, administrators, insurers, successors, assigns and all persons described in O.R.C. § 2125.02 with respect to Roger Troutman or the Estate of Roger Troutman (hereinafter collectively the "Roger Troutman Estate") and W. Michael Conway, the Administrator De Bonis Non of the Estate of Larry Troutman, for such estate and its heirs, administrators, executors, insurers, successors and assigns (hereinafter collectively the "Larry Troutman Estate") hereby agree as follows:

1. The Larry Troutman Estate will pay to the Roger Troutman Estate two-thirds of all sums currently in or received in the future by the Larry Troutman Estate after payment of all statutory priority claims against the Larry Troutman Estate.

2. In consideration of the promises set forth herein and other good and valuable consideration, the Roger Troutman Estate and the Larry Troutman Estate each hereby releases and discharges the other from any and all past, present and future actions, causes of action, claims, damages, costs, liabilities, expenses, compensation, third-party action, suits at law or in equity, including claims or suits for contribution and/or indemnity of whatever nature arising from the beginning of time to the date of this Settlement Agreement and Release, whether known or

unknown, accrued or unaccrued, or manifested or unmanifested, including but not limited to all claims, including tort and negligence claims, which were or may have been asserted against either Estate based upon or arising from the injuries to or death of Roger or Larry Troutman or which were or may have been asserted against the Larry Troutman Estate in the lawsuit captioned *Estate of Roger Troutman, Deceased, Plaintiff v. Estate of Larry Troutman, Deceased, Defendant,* currently pending in the Montgomery County (Ohio) Common Pleas Court as Case No. 01-2153 (the "Litigation").

3. The parties each agree to forthwith take all steps necessary to seek the review and approval of the terms of this Settlement Agreement by the Probate Courts with jurisdiction over both the Larry Troutman Estate and Roger Troutman Estate. In the event any such Probate Court does not approve all the terms of this Settlement Agreement and Release, this Settlement Agreement and Release shall be void and shall be of no effect whatsoever.

4. In consideration of the promises and payments referenced herein, the Roger Troutman Estate agrees to indemnify the Larry Troutman Estate from any liability, claim, chose in action or cause of action asserted against the Larry Troutman Estate by any person claiming to be an executor, administrator, surviving spouse, child, parent, or next of kin of Roger Troutman entitled to any recovery based upon or arising from the death of Roger Troutman under the Ohio Wrongful Death Statute ("Roger Troutman

Wrongful Death Claim"). The Estate of Roger Troutman further agrees to indemnify the Estate of Larry Troutman for all costs and expenses incurred in defending against any such Roger Troutman Wrongful Death Claim, including reasonable attorney fees, costs and all other expenses incurred in such defense.

5. In consideration of the promises and payments referenced herein, the Larry Troutman Estate agrees to indemnify the Roger Troutman Estate from any liability, claim, chose in action or cause of action asserted against the Roger Troutman Estate by any person claiming to be an executor, administrator, surviving spouse, child, parent, or next of kin of Larry Troutman entitled to any recovery based upon or arising from the death of Larry Troutman under the Ohio Wrongful Death Statute ("Larry Troutman Wrongful Death Claim"). The Estate of Larry Troutman further agrees to indemnify the Estate of Roger Troutman for all costs and expenses incurred in defending against any such Larry Troutman Wrongful Death Claim, including reasonable attorney fees, costs and all other expenses incurred in such defense.

6. Upon approval of this Settlement Agreement and Release by the Probate Courts with jurisdiction over the Larry Troutman Estate and Roger Troutman Estate, respectively, the Roger Troutman Estate shall dismiss the Litigation with prejudice.

7. Each party shall bear its own attorney fees, court costs, and expenses incurred in the Litigation

and in the negotiation and effectuation of this Settlement Agreement and Release.

8. This Settlement Agreement and Release integrates all understandings between the parties, and supersedes all prior representations, undertakings and agreements.

9. It is understood and agreed that this Settlement Agreement and Release is the compromise of a disputed claim, and that the payment and delivery of the aforementioned consideration is not to be construed as an admission of liability on the part of any of the parties or persons referenced herein.

10. This Settlement Agreement and Release is freely and voluntarily executed by all parties hereto after each party has been apprised of all relevant information and upon the advice of counsel. Each party, in executing this Settlement Agreement and Release, does not rely on any inducements, promises or representations of any other party or any other party's counsel.

11. This Settlement Agreement and Release is to be governed by and construed in accordance with the laws of the State of Ohio.

12. This Settlement Agreement and Release may be signed in counterparts, and all such counterparts will collectively have the same effect as if each party had signed the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Settlement Agreement and Release on the date set forth under their signatures.

ESTATE OF
ROGER TROUTMAN

Date: _____ By: _____
Rufus Troutman,
Administrator of the
Estate of Roger Troutman

STATE OF OHIO)
) ss:
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of ___, 2007, by Rufus Troutman, Executor or Administrator for the Estate of Roger Troutman.

_____
Notary Public

ESTATE OF
LARRY TROUTMAN

Date: March 21, 2007 By: W. Michael Conway
W. Michael Troutman
Administrator De Bonis
Non for the Estate of
Larry Troutman
Administrator of the
Estate of Roger Troutman

STATE OF OHIO)
) ss:
COUNTY OF MONTGOMERY)

The foregoing instrument was acknowledged before me this 21 day of March, 2007, by W. Michael Conway, Administrator De Bonis Non for the Estate of Larry Troutman.

/s/ Brenda J. Storck
Notary Public

Brenda J. Storck, Notary Public
In and For the State of Ohio
My Commission expires: 5/31/09

EXHIBIT B

SETTLEMENT AGREEMENT

This Agreement is entered into between W. Michael Conway, Administrator De Bonis Non of the Estate of Larry Troutman, deceased ("Mr. Conway"), Fidelity and Deposit Company of Maryland, ("F&D"), and Lynette W. Troutman ("Ms. Troutman") (hereinafter collectively referred to as "the Parties").

WHEREAS, Larry Troutman died intestate on June 29, 1999;

WHEREAS, Ms. Troutman as surviving spouse, was appointed Administrator of the Estate of Larry Troutman in Montgomery County Common Pleas Court, Probate Division Case No. 332899 on November 9, 2000 (hereinafter "the Estate");

WHEREAS, Ms. Troutman posted fiduciary bonds issued by F&D, (hereinafter "the Bonds") including but not necessarily limited to the bonds attached hereto and incorporated by reference as Exhibits A, B and C;

WHEREAS, both before and after her term as Administrator of the Estate, Ms. Troutman converted assets of the Estate for her own use and personal benefit, and otherwise made improper disbursements and distributions of assets of the Estate without Probate Court approval;

WHEREAS, Ms. Troutman was removed as Administrator of the Estate on September 16, 2002, and Mr. Conway was appointed Administrator De Bonis Non of the Estate in her place;

WHEREAS, on July 10, 2003, Mr. Conway, as Administrator De Bonis Non of the Estate of Larry Troutman commenced a surcharge action in the Common Pleas Court of Montgomery County, Probate Division, being Case No. 344238 (hereinafter "the Surcharge Action");

WHEREAS, the Parties participated in a mediation to resolve their differences on November 10, 2005;

WHEREAS, as a result of such mediation, the Parties reached a settlement agreement with respect to the Surcharge Action and certain issues which have arisen in the Estate, subject to court approval;

WHEREAS, the Parties believe that such settlement is reasonable and in the best interest of all parties;

WHEREFORE, the Parties agree as follows:

1. Upon approval of this Agreement by the Probate Court as set forth in paragraph no. 3 below, F&D agrees to remit to Mr. Conway as Administrator De Bonds Non of the Estate the sum of $100,000.00 in full satisfaction of its obligation on the Bonds. Such payment by F&D shall operate to reduce Ms. Troutman's liability to the Estate. Provided, however, this Agreement shall not otherwise affect or discharge Ms. Troutman's liability to the Estate.

2. Upon receipt of the payment referenced in paragraph no. 1 above, Mr. Conway agrees to dismiss his claims against F&D in the Surcharge Action with prejudice, and to dismiss his claims against Ms. Troutman in the Surcharge Action without prejudice.

3. Except for the obligations of the Parties as set forth in paragraph no. 4, this Agreement is expressly conditioned upon the Probate Court in the Estate entering an Order approving this Agreement, and including the following additional terms:

A. The Bonds shall be discharged in their entirety, and F&D shall be released from all liability with respect to the Bonds and the Estate.

B. Upon Mr. Conway and/or the Court calculating the amount of Ms. Troutman's

intestate share in accordance with Ohio Revised Code Section 2105.06, and before any distribution to Ms. Troutman, Mr. Conway shall pay the amount of such share to F&D instead of Ms. Troutman, up to a maximum of $100,000.00, in recognition of F&D's right of subrogation against Ms. Troutman. The amount so paid by Mr. Conway to F&D shall reduce Ms. Troutman's obligation to F&D on the Bonds by the amount of such payment, and shall reduce the amount otherwise distributable from the Estate to Ms. Troutman by the amount of such payment. Such payment to F&D shall be made before any other deductions, offsets, or other adjustments in Ms. Troutman's intestate share as calculated under Section 2105.06, and specifically shall be paid before any deductions, offsets or other adjustments relating to the Amended Magistrate's Decision filed on March 3, 2004 in the Estate, the Magistrate's Decision filed on September 16, 2002 in the Estate, or any subsequent proceedings relating to such decisions, it being the intention of the parties that F&D receive a dollar of [sic] dollar return of the $100,000.00 paid by it, up to the amount of Ms. Troutman intestate share of the Estate as exclusively calculated under Section 2105.06.

4. Upon this Agreement being signed by all parties, Mr. Conway agrees to file a motion in the

Estate requesting that the Probate Court enter the Order provided for in paragraph no. 3 above, after hearing, with notice to all potential heirs and their legal counsel, if any, as well as to the parties to this Agreement. The parties, individually or through their counsel, agree to appear at such hearing and request that the Court enter the Order provided for in paragraph no. 3 above. Except for the provisions of this paragraph no. 4, this Agreement is contingent upon and shall be effective only upon Court approval and filing of a final Order consistent with the provisions of paragraph no. 3 above and the intent of this Agreement. In the event that the Court does not approve this Agreement or enter such a final Order, this Agreement shall be rendered null and void and be of no further force or effect.

5. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement.

6. The Parties represent that they have not assigned to any other person or entity any of the claims which are the subject of this Agreement.

7. This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof, and supersedes any and all prior agreements, understandings, promises, and representations made by any party to the other concerning such subject matter. This Agreement may not be modified in any manner except by an instrument in

writing signed by all parties. This Agreement is the result of arms-length negotiations between the Parties, and shall be interpreted without regard to the identity of the drafter. A waiver of any provision of this Agreement in the event of breach thereof shall not constitute a waiver of that or any other provision in the event of any subsequent breach or breaches.

8. Ms. Troutman understands that she has the right to consult with legal counsel prior to signing this Agreement, and acknowledges that she is voluntarily giving up such right. Ms. Troutman understands that this Agreement does not release any claims that the other Parties may have against her, but does release F&D and discharges any obligation F&D has on the Bonds.

9. The Parties have read this agreement, understand its terms, and execute it voluntarily and with full knowledge of its significance.

IN WITNESS WHEREOF, the Parties have hereunto set their hands on the dates indicated below.

Witness:

/s/ Pete [Illegible]

/s/ W. Michael Conway
W. Michael Conway,
Administrator De
Bonis Non of the Estate
of Larry Troutman

Witness:

/s/ Brenda J. Storck

Date: 11-22-06

Witness:

_____ _____
Lynette W. Troutman

Witness:

_____ Date: _____

Witness: Fidelity & Deposit
Company of Maryland

_____ By: /s/ Patricia H. Schroeder
Pat Schroeder
Nov. 2, 2007

Witness:

_____

EXHIBIT A

Fidelity and Deposit Company

HOME OFFICE OF MARYLAND *BALTIMORE, MD. 21203*

Probate Court of Montgomery County, Ohio

Estate of Larry Troutman, Deceased

Case No. 326860 Docket_____ Page_____

FIDUCIARY'S BOND
(For Executors and all Administrators)

Amount of Bond $125,000.

The undersigned principal(s), and Fidelity and Deposit Company of Maryland, Surety, are obligated to the State of Ohio in the above amount, for payment of which we bind ourselves and our successors, heirs, executors and administrators, jointly and severally.

The principal has accepted in writing the duties of fiduciary in decedent's estate, including those imposed by law and such additional duties as may be required by the Court.

This obligation is void if the principal performs such duties as required.

This obligation remains in force if the principal fails to perform such duties, or performs them tardily, negligently, or improperly, or if the principal misuses or misappropriates estate assets or improperly converts them to his own use or the use of another.

Date 11-9-00

/s/ [Illegible]
Witness

/s/ x Lynette W. Troutman
Principal
Lynette W. Troutman

Witness

Principal

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Surety

_____ by /s/ H. R. Miller
Witness *Attorney in Fact*

Harold R. Miller
Typed or Printed Name

Attorney
Charles A. Smiley, Jr.

120 W. Second St., #1600
Address

Dayton, OH 45402

Address
233 Talbott Tower,
Dayton, Ohio 45402

Phone (937) 222-1366

EXHIBIT B

Fidelity and Deposit Company

HOME OFFICE OF MARYLAND *BALTIMORE, MD. 21203*

Probate Court of Montgomery County, Ohio

Estate of Larry Troutman, Deceased

Case No. 332-899 Docket _____ Page ____

ADDITIONAL
FIDUCIARY'S BOND
(For Executors and all Administrators)

Amount of Bond $375,000.00

The undersigned principal(s), and Fidelity and Deposit Company of Maryland, Surety, are obligated

to the State of Ohio in the above amount, for payment of which we bind ourselves and our successors, heirs, executors and administrators, jointly and severally.

The principal has accepted in writing the duties of fiduciary in decedent's estate, including those imposed by law and such additional duties as may be required by the Court.

This obligation is void if the principal performs such duties as required.

This obligation remains in force if the principal fails to perform such duties, or performs them tardily, negligently, or improperly, or if the principal misuses or misappropriates estate assets or improperly converts them to his own use or the use of another.

Date 10-24-01

/s/ x Lynette W. Troutman
Witness *Principal*

//
Witness *Principal*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Surety

by /s/ H. R. Miller
Witness *Attorney in Fact*

Harold R. Miller
Typed or Printed Name

Attorney
Charles A. Smiley, Jr.

120 W. Second St., #1600
Address
Dayton, OH 45402

Address
118 W. First St.,
Ste. 233
Talbott Tower
Dayton, Ohio 45402

Phone (937) 222-1366

EXHIBIT C

Fidelity and Deposit Company

HOME OFFICE OF MARYLAND *BALTIMORE, MD. 21203*

Probate Court of Montgomery County, Ohio

Estate of Larry Troutman, Deceased

Case No. 332899 Docket _____ Page _____

ADDITIONAL
FIDUCIARY'S BOND
(For Executors and all Administrators)

Amount of Bond $946,376.00

The undersigned principal(s), and Fidelity and Deposit Company of Maryland, Surety, are obligated to the State of Ohio in the above amount, for payment

of which we bind ourselves and our successors, heirs, executors and administrators, jointly and severally.

The principal has accepted in writing the duties of fiduciary in decedent's estate, including those imposed by law and such additional duties as may be required by the Court.

This obligation is void if the principal performs such duties as required.

This obligation remains in force if the principal fails to perform such duties, or performs them tardily, negligently, or improperly, or if the principal misuses or misappropriates estate assets or improperly converts them to his own use or the use of another.

Date November 26, 2001

	/s/ x Lynette W. Troutman
Witness	*Principal*
	Lynette W. Troutman
Witness	*Principal*
	FIDELITY AND DEPOSIT COMPANY OF MARYLAND
	Surety
	by /s/ H. R. Miller
Witness	*Attorney in Fact*
	Harold R. Miller
	Typed or Printed Name

Attorney
Charles A. Smiley, Jr.

120 W. Second St., #1600
Address
Dayton, OH 45402

Address
118 W. First St.,
Ste. 233
Talbott Tower
Dayton, Ohio 45402

Phone 937-222-1366

EXHIBIT C

SETTLEMENT FULL, FINAL AND COMPLETE RELEASE

1. **THE PARTIES:** "THE PARTIES" as used herein shall only include plaintiff W. MICHAEL CONWAY, Administrator De Bonis Non of the Estate of LAWRENCE TROUTMAN, and Defendant, Bettina Smiley, Administratrix of the Estate of Charles Smiley, Jr.

2. **RELEASE:** For valuable consideration, including but not limited to the payment of the amount of Twenty-Five Thousand Dollars ($25,000.00) paid to W. Michael Conway and his attorney David Rickert; **THE PARTIES** do hereby **RELEASE** and **DISCHARGE *EACH OTHER*** from all claims of any kind or character which they ever had, now have or might in the future have against each other, on account of any and all damages, losses or injuries, known and unknown, either developed or undeveloped,

resulting from an attorney-client relationship that occurred on or in April 2000 through September 2002, as more fully set forth in Case No. 03 CV 06527, currently pending in the Montgomery County Court of Common Pleas. Said Release includes but is not limited to all claims and/or counterclaims which exist or may exist from the beginning of time up to the signing of this Release as it relates only to **THE PARTIES** herein.

As inducement to and as consideration for the payment of the settlement amount, Plaintiff declares that he fully understands the terms of this Settlement and Release and that he voluntarily accepts the settlement amount for the purpose of making full and final compromise of any and all losses, damages and injuries of any type or kind heretofore incurred, now existing, or which may arise hereafter as a direct or indirect result of the claims that were raised or could have been raised in the Action or any other causes of action of any type or kind and any resulting injuries and damages. Plaintiff further warrants that he has entered into this Settlement and Release freely and voluntarily with the advice and consent of his counsel.

THE PARTIES acknowledge that this Release is a full, final and complete Release which fully **RELEASES** and **DISCHARGES THE PARTIES** from any and all claims and/or counterclaims which are in any way related to the above mentioned incident. After **THE PARTIES** sign this Release, they shall be forever barred from bringing any action in law or in

equity, in any court, against each other for anything related to said incident.

3. **CONFIDENTIALITY:** The terms and conditions of this agreement are confidential and are not to be disclosed unless required by a court order.

4. **OHIO LAW:** This Release is contractual and shall be interpreted in accordance with Ohio law and Ohio Revised Code 2307.28(A) and (B).

5. **MISCELLANEOUS: THE PARTIES** fully understand the terms of this settlement and agree that there are no collateral agreements between **THE PARTIES** hereto. Plaintiff represents and warrants that no other person or entity has any interest in the claims, demands, obligations, or causes of action referred to in this Settlement and Release and Plaintiff has the sole right, capacity and exclusive authority to execute this Settlement and Release and receive the sum specified in it and that Plaintiff has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Settlement and Release. W. Michael Conway further acknowledges he has been represented in this settlement proceeding by Attorney David Rickert.

THE PARTIES hereby state and agree that the consideration furnished pursuant to the terms of this Release does not constitute an admission of either fault or liability on the part of any **PARTY** for any claim or allegation relating to the aforementioned litigation.

PLEASE READ CAREFULLY BEFORE SIGNING!
THIS IS A RELEASE OF ALL RIGHTS!

/s/ W. Michael Conway Date: 4-10-07
W. Michael Conway,
Administrator De Bonis
Non of the Estate of Law-
rence Troutman

Witness: /s/ Brenda J. Storck Date: 4-10-07

Print Name: Brenda J. Storck

APPENDIX B

IN THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

W.MICHAEL CONWAY,	:	**CASE NO.: 2006 MSC 00330**
Plaintiff,	:	
vs.	:	**(McCOLLUM, J.)**
LYNETTE TROUTMAN, et al.	:	**ORDER**
	:	(Filed Apr. 11, 2008)
Defendants.	:	

This matter came before the Court for hearing on the request for authority for W. Michael Conway (Conway), Administrator De Bonis Non of the estate of Larry Troutman to enter into two settlement agreements. One agreement settles a wrongful death action pending in the Montgomery County Court of Common Pleas General Division, Case No. 01-CV-2153. The other agreement settles a malpractice action also pending in the Montgomery Court of Common Pleas, General Division, Case No 2003-CV-6527.

All interested persons were served with notice of the hearing and copies of the proposed settlement agreements. Present at the hearing were the parties with counsel. Conway was present with counsel, David Rickert. William Sherman was present as counsel for the Estate of Roger Troutman. Stephen Watring was present as counsel for Fidelity & Deposit Company of Maryland (FDC), the bonding company.

Lynette Troutman was present without her retained counsel. LuAnn Stanley, was present as Guardian Ad Litem for Lace Dior Love Troutman. Vicki Jarvis, was present with counsel Thomas Knoth and Crofford Macklin.

At the hearing, the court considered evidence on the merits of each of the cases, the proposed terms of the settlements, and the benefit of settling the matters to the estate of Larry Troutman. There was only one matter of contention.

FDC issued bond on Lynette Troutman's (Lynette) behalf while she served as administrator of the estate of Larry Troutman. Lynette agreed to the terms of the settlement after mediation, in which she essential [sic] admits to misdirecting some of the funds that should belong to the estate of Larry Troutman. FDC is obligated to cover these losses. FDC requested that Lynette be ordered to repay them from future distributions prior to the estate receiving its share of any misappropriated or misused funds. All other parties were adamantly opposed to this provision. The Court finds the position of FDC untenable.

Based upon the evidence presented, the Court hereby finds that the proposed settlements in the wrongful death action and the malpractice action are in the best interest of the Larry Troutman estate. Pursuant to R.C. §2117.05, this Court hereby grants authority to W. Michael Conway, as Administrator De Bonis Non of the estate of Larry Troutman, to enter and finalize these settlements on the terms as set

forth in the documents attached to Plaintiff's Notification of Proposed Settlement Agreements filed with this court on January 11, 2008. However, the provision for repayment of FDC from Lynette's future distributions from the Larry Troutman estate should also provide that such repayment will occur only after any misappropriated funds that rightfully belong to the estate of Larry Trouotman [sic] are deducted or offset from her distributive share.

IT IS SO ORDERED.

/s/ A. O. McCollum
ALICE O. McCOLLUM,
JUDGE

NOTICE OF FINAL APPEALABLE ORDER

TO THE CLERK: Please serve copies of the foregoing Entry, which may be a final appealable order, to all parties indicated below, on the date indicated below, by ordinary mail.

By: /s/ W [illegible] **Date:** 4-11-08

[Service List Omitted In Printing]

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(3)

Supreme Court, U.S.
FILED
MAY 2 - 2011
OFFICE OF THE CLERK

No. 10-1181

In The

SUPREME COURT OF THE UNITED STATES

LYNETTE TROUTMAN,
Petitioner,

v.

ESTATE OF ROGER TROUTMAN, et al.,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For Montgomery County, Ohio, Second Appellate District

PETITIONER'S REPLY MEMORANDUM

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Petitioner's Reply

Respondents' Brief In Opposition highlights the need for a resolution of the Question Presented For Review By Petitioner. According to Respondents, Ohio law is dispositive of the issues presented. They misinterpret Section 201(d), and cite no controlling federal decision. The fact of the matter is that **Ohio law is silent** on the issue whether or not the administrator may exercise dominion and control over a deceased author's interest in federally protected copyrights.

Ohio Revised Code Section 2113.31, which has been reproduced in Appendix "B", states that **not all personalty which comes into the hands of a fiduciary is to be "...included in the inventory..."** It is the view of the Petitioner that this is the case with a decedent's interest in copyrights. Since royalties are not to be included in the inventory, they may not be used to pay creditors. A fair reading of Ohio law supports Petitioner's arguments, and

the appellate court's decision is in error.

Respondents would have this Court believe that the parties have already decided the issue presented for review by attaching various settlement agreements to their Brief In Opposition. We disagree. The Petition never personally agreed that royalties belonged to the estate, and has always believed that the contrary was true. Appendix "A" attached hereto is the answer which was filed to Petitioner's complaint that was filed in the Montgomery County Ohio Probate Court. Respondents' answer never raised the affirmative defenses of settlement, nor accord and satisfaction, and these defenses may not be raised in this appeal. See, Hulbert v. City of Chicago, 201 U.S. 275 (1906). Furthermore, even if the Petitioner did agree to the settlements, the same are void for a lack of consideration, as no part of the decedent's interest in copyrights were to be included in the inventory, and there was no "bargained for exchange". See, Brown v. Best Products, Inc., 18 Ohio St. 3d 32 (1985).

At this point the only case which is dispositive of the issues raised in the writ is the erroneous decision which has been issued by the Ohio appellate court. Thousands of litigants, practitioners and estate planners will rely on, rather be puzzled by, this blatantly erroneous decision. It is clear that Congress has always intended to protect the author and his family. This Honorable Court may have a duty to the deceased author's surviving spouse and children, and to Congress, to scrutinize the appellate court's decision, and to ascertain whether or not the same is consistent with the United States Constitution and controlling federal decisions.

Wherefore, the Petitioner requests that the writ be granted; alternatively, Petitioner requests that the said clearly erroneous appellate court decision be summarily reversed.

Respectfully Submitted,
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APPENDIX A

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
PROBATE DIVISION

LYNETTE TROUTMAN, Plaintiff,	Case No. 2008MSC00081
v.	
ESTATE OF ROGER TROUTMAN, et al.,	(Judge McCollum)
Defendants and Third Party Plaintiffs,	ANSWER, COUNTERCLAIM AND THIRD PARTY COMPLAINT OF DEFENDANTS ESTATE OF LARRY TROUTMAN AND W. MICHAEL CONWAY
v.	
TIFFANIE WHITE-TROUTMAN 3923 Kings Highway Dayton, OH 45407,	
-and-	
REGINALD C. TROUTMAN 3923 Kings Highway Dayton, Ohio 45407,	
-and-	
LACE DIOR LOVE TROUTMAN c/o Vicky Jarvis	

1220 Governors Square Drive
Centerville, Ohio 45458,

-and-

TOIKA TROUTMAN-GONET
38611 Sienna Court
Palmdale, California 93550,

ASIA R. COLLINS
4001 Bellmore Trace
Trotwood, Ohio 45426,

-and-

AMBER D. CARROLL
Apt. G
3373 Shiloh Springs Road
Trotwood, Ohio 45426,

-and-

ROSALINE WILLIAMS
120 Washington Street
Hamilton, Ohio 45011

Third-Party Defendants.

W. Michael Conway, as Administrator De Bonis Non of the Estate of Lawrence Troutman, and on behalf of such Estate (hereinafter collectively, the "Answering Defendants"), hereby answers Plaintiff's Complaint as follows:

FIRST DEFENSE

1. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 1 of Plaintiff's Complaint and therefore deny each and every such allegation.

2. Answering Defendants admit the allegations set forth in paragraph 2 of Plaintiff's Complaint.

3. Answering Defendants admit the allegations set forth in Paragraph 3 of Plaintiff's Complaint.

4. Answering Defendant's admit the allegations set forth in Paragraph 4 of Plaintiff's Complaint, to the extent that this paragraph, and Plaintiff's Complaint in its entirety is intended to refer to Larry Troutman or the estate of Larry Troutman.

5. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 5 of Plaintiff's Complaint and therefore deny each and every allegation.

6. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 6 of Plaintiff's Complaint and therefore deny each and every such allegation.

7. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 7 of Plaintiff's Complaint and therefore deny each and every such allegation.

8. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 8 of Plaintiff's Complaint and therefore deny each and every such allegation.

9. Answering Defendants admit that at the time of his death, Larry Troutman was married to Lynette Troutman. Answering Defendants are without information sufficient to form a belief as to the truth or falsity of the remaining allegations set forth in Paragraph 9 of Plaintiff's Complaint and therefore deny each and every such allegation.

Conway incorporate all allegations admitted by them to be true as set forth above.

2. The Estate of Larry Troutman has, since his death, received, and continues to receive, royalty payments arising from and based upon Larry Troutman's copyright interest in various musical works.

3. Disputes have arisen with Lynette Troutman concerning, *inter alia*, the right of Larry Troutman or his heirs to receive such royalty payments.

4. All parties interested in the resolution of the above-referenced dispute have been joined as parties hereto.

5. Answering Defendants by statute and contract are entitled to the proceeds of such royalty payments and Answering Defendants are similarly entitled to a declaratory judgment so finding, to resolve the above-referenced dispute.

WHEREFORE, Answering Defendants demand that Plaintiff's Complaint for Declaratory Judgment be dismissed

with costs to be borne by Plaintiff.

Answering Defendants are further entitled to a declaratory judgment by this Court finding that the Estate of Larry Troutman is entitled to receive those continuing royalty payments previously earned by and paid to Larry Troutman, and that such rights supersede any right of any of the other parties to this action to such prior and ongoing royalty payments.

Answering Defendants further pray for the costs of this action and any other and further relief to which they are entitled.

Respectfully submitted,

/s/Erica J. Glass for
David M. Rickert (0010483)
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Attorney for Defendants Estate
Of Larry Troutman, and
Michael Conway, Administrator

App. 11

De Bonis
Non of the Estate of Larry
Troutman

APPENDIX B

Ohio Revised Code Section 2113.31 reads follows:

Every executor or administrator is chargeable with all chattels, rights, and credits of the deceased which come into his hands and are to be administered, **although not included in the inventory required by section 2115.02 of the Revised Code.** Such executor of administrator is also chargeable with all proceeds of personal property and real estate sold for the the payment of debts or legacies, and all the interest, profit, and income that in any way comes to his hands from the personal estate of the deceased (emphasis added).